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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 13

WILLIAM L. MAXWELL,

Petitioner,

—v.—

O.E. BISHOP, Superintendent of Arkansas State Penitentiary,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONER

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Supreme Court of the United States

Jurisdiction

Questions Presented

Constitutional and Statutory Provisions Involved

Fourteenth Amendment. (A. 9-10.) Finally, petitioner alleged that the arbitrary capital sentencing practices which he attacked had in fact resulted in arbitrary application of the death penalty by Arkansas juries for the crime of rape. Negroes convicted of the rape of white women were discriminatorily sentenced to die on account of race. (A. 5-7.)

The federal district court allowed a thorough evidentiary hearing on the racial discrimination claim. (A. 17-18.) That claim has been excluded from the present phase of the case by this Court's limited grant of certiorari (A. 161), and we need not unravel this statement by the evidence the evidence presented at the hearing. However, we shall have occasion to refer to it in the argument portions of this brief, under the principle that where a state practice is challenged as conferring arbitrary and lawless power tending to abuse in a manner forbidden by the Fourteenth Amendment, proof that the power has in fact been regularly abused is entitled to considerable weight. For this reason, as set forth in Appendix A to the brief, pp. [illegible], a detailed description of petitioner's evidence in the district court relating to a thorough and extensive empirical study of capital sentencing by Arkansas juries of rape cases during the period 1945-1965, together with the findings of the district court and of the court of appeals in reference to this study. (Appendix to be sent will hereafter be cited as App. p. [illegible].)

After hearing, the district court rendered its opinion of August 20, 1965. (A. 20-41), rejecting petitioner's contention of discrimination (A. 31-40) and upholding the Arkansas procedures of unfettered jury discretion in capital

Summary of Argument

decide a particular case, a power to determine the question of life or death that is unlike any other power possessed by a jury, or even by a court, in our legal system. The life or death decision is made utterly without standards or governing legal principles; it is made without the limitation of requisite factual findings, or of required attention to any issues or realm of fact, or of required consideration of any general rule or policy of law; it is made without any judicial control over the process or the consequence of the jurors' determination. The conscientious and fair-minded juror is given not the slightest idea what he is to do, while the covert discriminator is given absolute license to practice his biases in the matter of taking human life. This unfettered jury discretion is, rather, naked and arbitrary power, lacking every attribute of legal discretion—and is likened only to the unmanageable procedure of submitting to a jury in a civil case the unanswered question whether the defendant ought to be liable to the plaintiff; or, in a criminal case, whether the defendant has done something for which he should be punished. Such submissions are not made anywhere in American law except in the capricious decision whether [illegible] shall live or die. Thus today, the rule of law that is basic to Due Process, and especially critical in regard to the choice of life or death,

Unfettered jury discretion in capital sentencing exhibits those vices that have repeatedly been condemned by this Court under the constitutional principles forbidding indefiniteness in penal legislation. First, a capital defendant, with his life at stake, does not fairly know how to conduct his defense. He does not know how to take into consideration whether the jurors will regard mental disorder as a mitigating circumstance or an aggravating one; nor whether five jurors will think the circumstances mitigating while seven vote to kill him for it. As a result, the capital trial

is a grisly game of blind man's bluff, played for the defendant's life. Second, and more important, the conferring on the jury of "a naked and arbitrary power" (*Fisk II v. Hopkins*, 118 U.S. 356, 360 (1886)) to take a man's life for any reason or for no reason offends the principle of legality, of regularity—the principle requiring a rule of law and not of men—which the Due Process Clause asserts as a protection against laws that would otherwise be "susceptible of sweeping and improper application" (*N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)), "lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guarantee of just and equal laws" (*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)). Due Process of Law fundamentally repudiates any such power, which "leaves . . . juries free to decide, without any legally fixed standards" (*Giaccio v. Pennsylvania*, 382 U.S. 399 (1966)), whether human life shall or shall not be forfeit, even as a punishment for crime.

II

The vices of unfettered jury discretion are compounded when the jury's life-or-death decision is made under a single-verdict procedure. Whereas unfettered discretion allows the jury arbitrary power, the single-verdict trial virtually requires that that power be exercised arbitrarily. This is so because information that is absolutely essential to rational sentencing cannot be presented to the jury except at the cost of an unfair trial on the issue of guilt or innocence, and of collateral harm to the defendant's privilege against self-incrimination.

The single-verdict capital trial is federally unconstitutional for two reasons. First, it unreasonably compels a choice between the defendant's Fifth and Fourteenth

that Due Process assuredly demands when a state empowers its jurors "to answer 'yes' or 'no' to the question whether this defendant was fit to live" (*Witherspoon v. Illinois*, 391 U.S. 510, 521 n. 20 (1968)).

ARGUMENT

Introduction: The Fact and Implications of Arbitrary Capital Sentencing

Knowledgeable observers of the administration of capital punishment in the United States agree that death is meted out among persons convicted of capital crimes in a fashion that is uneven, rationally unsupportable and arbitrary in the extreme.

"Of all the uncertain manifestations of justice, capital punishment is the most inequitable. It is primarily carried out against the destitute, forlorn and forgotten.

Members of racial and cultural minority groups suffer most. The hundreds of extraneous factors, including geography, that decide whether a convicted man will actually live or die makes capital punishment a ghastly, brainless lottery." (Dr. Louis J. West, "A Psychiatrist Looks at the Death Penalty," Paper Presented at the 122nd Annual Meeting of the American Psychiatric Association, Atlantic City, New Jersey, May 14, 1969, p. 2.)

Arbitrariness in the selection of men to be put to death takes several forms. First, there is simply the matter of baseless discrimination among individuals. Foolish, whimsical, erratic differences in the treatment of similar men guilty of similar offenses. As the Attorney General of the United States put it recently:

> "A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned. Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those of men on death row." (Statement by Attorney General Ramsey Clark, Before the Subcommittee on Criminal Laws and Procedures of the Senate Judiciary Committee, on S. 1760, *To Abolish the Death Penalty*, July 2, 1968, Department of Justice Release, p. 2.)

Those who should surely know—the respected long-time wardens of Sing-Sing and San Quentin prisons—corroborate the Attorney General. LAWES, TWENTY THOUSAND YEARS IN SING SING (1932) 302, 307-310; DUFFY & HIRSHBERG, 88 MEN AND 2 WOMEN (1962) 254-255.[9]

Second, there is economic and caste discrimination.

> "[T]he death penalty . . . almost always hits the little man, who is not only poor in material possessions but in background, education, and mental capacity as well. Father Daniel McAlister, former Catholic chaplain at San Quentin, points out that 'the death penalty seems to be meant for the poor, uneducated, and legally impotent offender.'" (DUFFY & HIRSHBERG, *op. cit. supra*, 256-257.)

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[9] See also the testimony of Clinton T. Duffy, in United States Senate, Subcommittee on Criminal Laws and Procedures of the Committee on the Judiciary, Hearings on S. 1760, *To Abolish the Death Penalty* (unprinted report of proceedings, March 20, 1968), vol. 1, pp. 44-44A: "I have often said, and I repeat here, that I can take you into San Quentin Prison or to Sing Sing, Leavenworth or Atlanta Prisons and I can pick out many prisoners in each institution serving life sentences or less, and can prove that their crimes were just as atrocious, and sometimes more so, than most of those men on the row."

Former Ohio Governor Michael DiSalle has made the same point: "I want to emphasize that from my own personal experience those who were sentenced to death and appeared before me for clemency were mostly people who were without funds for a full and adequate defense, friendless, uneducated, and with mentalities that bordered on being defective." (DiSalle, *Comments on Capital Punishment and Clemency*, 25 OHIO STATE L. J. 71, 72 (1964).)[10]

Third, there is persuasive evidence of that most corrosive and invidious form of discrimination, racial prejudice, in the selection of the men who will die. The Federal Bureau of Prisons maintains reliable statistics on executions in the United States since 1930. Between that year and 1962, the year in which petitioner Maxwell was sentenced to die, 446 persons were executed for rape in this country.[11] Of these,

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[10] See also the testimony of Michael DiSalle, in Hearings, note 9 *supra*, vol. 1, pp. 14-16. The Governor's observations are supported by those of scholars who have undertaken to describe the characteristics of men on death row in other states. E.g., Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964); Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165 (1957). And see the study of Florida's death row population described in the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin* v. *Alabama*, O.T. 1968, No. 642, at p. 7 n. 8.

[11] The figures below are taken from UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 32, Executions 1962 (April, 1963), which was put in evidence as petitioner's Exhibit P-6 at the habeas corpus hearing below. Table 1 thereof shows the following numbers and percentages of executions under civil authority in the United States between 1930 and 1962:

	Negro	*White*	*Other*	*Total*
Rape	399 (89.5%)	45 (10.1%)	2 (0.4%)	446 (100%)
Murder	1619 (49.1%)	1640 (49.7%)	39 (1.2%)	3298 (100%)
Other	31 (45.6%)	37 (54.4%)	0 (0.0%)	68 (100%)
Total	2049 (53.7%)	1722 (45.2%)	41 (1.1%)	3812 (100%)

(Continued on p. 14)

399 were Negroes, 45 were whites, and 2 were Indians. All were executed in Southern or border States or in the District of Columbia. The States of Louisiana, Mississippi, Oklahoma, Virginia, West Virginia and the District never executed a white man for rape during these years. Together they executed 66 Negroes. Arkansas, Delaware, Florida,

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(Continued from p. 13)

Table 2 thereof shows the following numbers of executions under civil authority in the United States between 1930 and 1962, for the offense of rape, by race and state:

Jurisdiction	*Negro*	*White*	*Other*	*Total*
Federal	0	2	0	2
Alabama	20	2	0	22
Arkansas	17	1	0	18
Delaware	3	1	0	4
District of Columbia	2	0	0	2
Florida	35	1	0	36
Georgia	58	3	0	61
Kentucky	9	1	0	10
Louisiana	17	0	0	17
Maryland	18	6	0	24
Mississippi	21	0	0	21
Missouri	7	1	0	8
North Carolina	41	4	2	47
Oklahoma	4	0	0	4
South Carolina	37	5	0	42
Tennessee	22	5	0	27
Texas	66	13	0	79
Virginia	21	0	0	21
West Virginia	1	0	0	1
Total	399	45	2	446

The figures have not changed appreciably since 1963. According to the latest National Prisoner Statistics Bulletin, UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, No. 42, Executions 1930-1967 (June, 1968), p. 7, table 1, the following are the numbers and percentages of executions under civil authority in the United States between 1930 and 1967:

	Negro	*White*	*Other*	*Total*
Rape	405 (89.0%)	48 (10.6%)	2 (0.4%)	455 (100%)
Murder	1630 (48.9%)	1664 (49.9%)	40 (1.2%)	3334 (100%)
Other	31 (44.3%)	39 (55.7%)	0 (0.0%)	70 (100%)
Total	2066 (53.1%)	1751 (45.4%)	42 (1.1%)	3859 (100%)

(Continued on p. 15)

Kentucky and Missouri each executed one white man for rape between 1930 and 1962. Together they executed 71 Negroes. Putting aside Texas (which executed 13 whites and 66 Negroes), sixteen Southern and border States and the District of Columbia between 1930 and 1962 executed 30 whites and 333 Negroes for rape: a ratio of better than one to eleven. The nationwide ratio of executions for the crime of murder was considerably less startling—one Negro for each one white—but still startling enough, since Negroes constituted about one-tenth of the Nation's population during these years.

Of course, these suspicious figures might be explained, not by arbitrary and discriminatory administration of the death penalty, but by some rather extravagant hypotheses about the Negro crime rate.[12] Responsible analysts have rejected such an explanation. With virtual unanimity, commissions and individuals studying capital punishment have found

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(Continued from p. 14)
The following is the breakdown of the 435 men reported under sentence of death in the country as of December 31, 1967 (*id.*, pp. 22-23, table 10):

	Negro	*White*	*Other*	*Total*
Nine Northeastern States	33	29	0	62
Twelve North-Central States	24	31	0	55
Thirteen Western States	21	68	2	91
Sixteen Southern States	159	66	0	225
Federal	1	1	0	2
Total	238	195	2	435

[12] In fact, the number of crimes committed by Negroes appears to be three to six times higher than that which the ratio of Negroes in the population would lead one to expect. See BEDAU, THE DEATH PENALTY IN AMERICA (1964) 412. Negroes constitute one-tenth or one-ninth of the population (depending upon the time periods under consideration). So, instead of the expectable one Negro-committed crime to every nine white-committed crimes, there are three to six Negro crimes to every nine white crimes. Far more crimes numerically are obviously committed by whites than by Negroes. Yet one Negro murder convict is executed for every white murder convict executed; and *nine* Negro rape convicts are executed for every white rape convict executed. See text, *supra*.

"evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967) 143. See also UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT (ST/SOA/SD/9-10) (1968) 32, 98; PENNSYLVANIA, JOINT LEGISLATIVE COMMITTEE ON CAPITAL PUNISHMENT, REPORT (1961) 14-15; MATTICK, THE UNEXAMINED DEATH (1966) 5, 17; BEDAU, THE DEATH PENALTY IN AMERICA (1964), 411-413; Bedau, *A Social Philosopher Looks at the Death Penalty,* 123 AM. J. PSYCHIATRY 1361, 1362 (1967); Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge,* 40 F.R.D. 55, 66-68 (1966); Johnson, *Selective Factors in Capital Punishment,* 36 SOCIAL FORCES 165 (1957); Hartung, *Trends in the Use of Capital Punishment,* 284 ANNALS 8, 14-17 (1952); Garfinkel, *Research Note on Inter- and Intra-Racial Homicides,* 26 SOCIAL FORCES 369 (1949); Johnson, *The Negro and Crime,* 271 ANNALS 93 (1941).

In order to provide a more systematic and rigorous examination of the evidence of racial differentials in capital sentencing, an extensive empirical study of sentencing patterns in rape cases was undertaken in 1965 by Dr. Marvin E. Wolfgang, an eminent criminologist, at the request of counsel for petitioner Maxwell (who also represent numerous condemned men in other States). Dr. Wolfgang's study covered every case of conviction for rape in 250 counties in eleven States during the twenty-year period 1945-1965. The data gathered in Arkansas, and Dr. Wolfgang's analysis of that data, were the subject of his testimony at the habeas corpus hearing below. The testimony and the findings of

the lower courts relating to it are described in detail in Appendix A, pp. 1a-23a *infra*. We summarize them briefly here because of the importance of Dr. Wolfgang's conclusions, which confirm the earlier impressions of racial discrimination on the basis of the first fully controlled, exacting scientific study of the subject.

Dr. Wolfgang's study began with the collection of data concerning every case of conviction for the crime of rape on the docket books of nineteen randomly selected Arkansas counties, containing 47% of the State's total population, for the twenty years 1945-1965. The nineteen counties were selected by accepted areal sampling methods with the goal of producing a sample that would be representative of the State of Arkansas as a whole; and, in the opinion of the expert statistician whom Dr. Wolfgang employed to perform the sampling operation, "inferences drawn from this sample . . . are valid for the State of Arkansas." One point should be stressed. The study, from the outset, concerns cases of *conviction* for the capital crime of rape, and what is studied is the performance of Arkansas juries in selecting the convicted defendants upon whom they impose the death penalty. It thus controls completely the possibility, suggested above, that high frequencies observed in the sentencing of Negroes to die for the crime of rape might be explained by the supposition that Negroes commit rape, or are convicted of rape, more frequently than whites. This study compares the rate of death sentencing for Negro and white defendants *all of whom* have been convicted of rape.

Field researchers dispatched to Arkansas conducted an exhaustive investigation of each case where a rape conviction had been had in the sample counties. They followed a predetermined pattern for exploring the available sources of information about each case, beginning with court records, trial transcripts, witness blotters, file jackets, judicial opinions, etc., then proceeding to prison and pardon board

records, and finally to newspaper files and interviews with trial counsel. They had uniform procedures for assigning priorities to information sources in the event of conflicts; and they used a uniform schedule, with objectively defined categories, for recording the data found. At the hearing below, the State of Arkansas conceded the validity of all of the data thus gathered and recorded.

The "critical" data for each case were race of defendant, race of victim, and sentence. Dr. Wolfgang analyzed these variables and found conclusively that Negro defendants convicted of the rape of white women were disproportionately frequently sentenced to death. Applying tests of statistical significance that are generally used in the social sciences (and in other disciplines, such as medical research, as well), he found that the disproportionate frequency with which the death sentence was imposed on these Negro defendants was so great that there was a less than two per cent probability of its having occurred by chance. Put another way, if race were not really related to the capital sentencing patterns of Arkansas juries, the results observed in the twenty years between 1945 and 1965 could have occurred fortuitously in fewer than two twenty-year periods since the birth of Christ. Not surprisingly, the district court agreed with Dr. Wolfgang in finding that the markedly over-frequent sentencing to death of Negroes convicted of rape of white women "could not be due to the operation of the laws of chance."

Dr. Wolfgang next proceeded to determine whether any other ascertainable circumstance in these rape cases could account for the differential sentencing. The data gathered by the researchers included not merely race and sentence, but 28 pages of information about each case: characteristics of the defendant (age, family status; occupation; prior criminal record; etc.) and of the victim (age; family status;

occupation; husband's occupation if married; reputation for chastity); nature of the defendant-victim relationship (prior acquaintance; prior sexual relations, manner in which defendant and victim arrived at the scene of the offense); circumstances of the offense (number of offenders and victims; place; degree of violence or threat employed; degree of injury received by victim; housebreaking or contemporaneous offenses committed by defendant; presence of members of the victim's family and threats or violence employed against them; nature of intercourse; involvement of alcohol; etc.); and circumstances of the trial (plea; presentation of defenses of insanity or consent; joinder for trial of other charges against the defendant or co-defendants; whether defendant testified; nature of his legal representation (retained or appointed); etc.). Every one of these variables for which sufficient information could be gathered from the official records and other sources studied was analyzed with a view to determining whether it might explain or account for the phenomenon of racially differential sentencing. Dr. Wolfgang concluded that no non-racial variable of which analysis was possible could account for the differential observed. His ultimate conclusion was "that Negro defendants who rape white victims have been disproportionately sentenced to death, *by reason of race,* during the years 1945-1965 in the State of Arkansas."

The district court disagreed with this ultimate conclusion, but for reasons that the court of appeals appears to have thought unpersuasive and which will hardly survive scrutiny of the record. See Appendix A, pp. 19a-23a *infra.* The court of appeals itself rejected petitioner's *legal* contention of racial discrimination, for doctrinal reasons that are not now relevant; but it obviously thought that Dr. Wolfgang's *factual* finding of discrimination was not rebuttable. It expressly found that "[t]here are recognizable

indicators . . . that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it."

We have set forth this evidence of arbitrary and discriminatory capital sentencing at the outset of our argument for three reasons. First, our specific constitutional attacks upon the Arkansas death-sentencing procedures by which petitioner Maxwell was condemned are, in essence: (1) that the unfettered discretion given Arkansas juries to select between the penalties of life and death, without the guidance of standards or control by legal principles of any sort, allows wholly arbitrary deprivation of human life, in violation of Due Process, and (2) that Arkansas' single-verdict practice in capital trials in effect compels the arbitrary exercise of this arbitrary power because it deprives the defendant who exercises his privilege against self-incrimination of the opportunity to present to the sentencing jury information that is the indispensable prerequisite of rational sentencing choice. As this Court's prior decisions in several differing sorts of cases make clear, evidence that abuse has in fact occurred has a considerable bearing on the issue whether a practice challenged on the ground of lawlessness tending to abuse is susceptible to that challenge. See cases cited in note 3 *supra.*

Second, there is obviously the most intimate sort of relationship between laws maintaining the death penalty, procedures which allow its imposition arbitrarily, and racial and caste discrimination in its actual administration. In the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae,* in the companion case of *Boykin* v. *Alabama,* O.T. 1968, No. 642, we have analyzed one aspect of that relationship: the point that the "public can easily bear the rare, random occurrence of a punishment

which, if applied regularly, would make the common gorge rise." (Id., at 55.) "A legislator may not scruple to put a law on the books whose general, even-handed, non-arbitrary application the public would abhor—precisely because both he and the public know that it will not be enforced generally, even-handedly, non-arbitrarily." (*Id.*, at 39; see generally *id.*, at 35-61.)

This is most obviously the case with regard to the death penalty for rape. Only sixteen American jurisdictions retain capital punishment for that offense. Nevada permits imposition of the penalty exclusively in cases where rape is committed with substantial bodily harm to the victim.[13] The remaining fifteen jurisdictions—which allow their juries absolute discretion to punish any rape with death—are all Southern or border States.[14] The federal jurisdiction and the District of Columbia also allow the death penalty for rape in the jury's unfettered discretion.[15] We think the

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[13] Nev. Rev. Stat. §200.363 (1967). See also §200.400 (1967) (assault with intent to rape, accompanied with acts of violence resulting in substantial bodily harm).

[14] The following sections punish rape or carnal knowledge unless otherwise specified. Ala. Code §§14-395, 14-397, 14-398 (Recomp. Vol. 1958); Ark. Stat. Ann. §§41-3403, 43-2153 (1964 Repl. Vols.); see also §41-3405 (administering potion with intent to rape); §41-3411 (forcing marriage); Fla. Stat. Ann. §794.01 (1964 Cum. Supp.); Ga. Code Ann. §§26-1302, 26-1304 (1963 Cum. Supp.); Ky. Rev. Stat. Ann. §435.090 (1963); La. Rev. Stat. Ann. §14:42 (1950) (called aggravated rape but slight force is sufficient to constitute offense; also includes carnal knowledge); Md. Ann. Code §27-463 (1967 Cum. Supp.); see also §27-12 (assault with intent to rape); Miss. Code Ann. §2358 (Recomp. Vol. 1956); Vernon's Mo. Stat. Ann. §559.260 (1953); N.C. Gen. Stat. §14-21 (Recomp. Vol. 1953); Okla. Stat. Ann. Tit. 21, §§1111, 1114, 1115 (1958); S.C. Code Ann. §§16-72, 16-80 (1962) (includes assault with attempt to rape as well as rape and carnal knowledge); Tenn. Code Ann. §§39-3702, 39-3703, 39-3704, 39-3706 (1955); Tex. Pen. Code Ann., arts. 1183, 1189 (1961); Va. Code Ann. §18.1-44 (Repl. Vol. 1960); see also §18.1-16 (attempted rape).

[15] 18 U.S.C. §2031 (1964); 10 U.S.C. §920 (1964); D.C. Code Ann. §22-2801 (1961).

relationship is obvious between this map of the legal incidence of capital punishment for rape and the discriminatory exercise of juries' discretion in the actual imposition of death sentences. It is also worth noting that, outside the United States, rape is punishable by death only in Malawi, Taiwan, and the Union of South Africa.[16]

The mediating links between the allowability on the statute books of the death penalty for a crime and its actual use against the few, arbitrarily selected outcasts yearly chosen to die are provided by the death-sentencing procedures challenged in the present case. It is these procedures by which laws of apparently uniform application are converted in practice into instruments of the most vicious discrimination. Their rare, arbitrary and discriminatory use against the poor and the disfavored insulates the laws, in turn, against fair public scrutiny and reprobation. At the same time that a capricious, *ad hoc* selection of the men to be killed makes sentencing patterns virtually immune against judicial control under the Equal Protection Clause,[17] the indefinite and arbitrary character of the sentencing procedures themselves effectively precludes constitutional control of particular death sentences rendered by individual

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[16] United Nations, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10) (1968), pp. 40, 86.

[17] We make this point at greater length in the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin* v. *Alabama*, O.T. 1968, No. 642, at 53-55. The opinion of the district court below presents an obvious instance of judicial inability to detect racial discrimination where it is concealed under the additional veil of *ad hoc* arbitrariness. See A. 37-40. "Obviously, a State can discriminate racially and not get caught at it if it kills men only sporadically, not too often. By being arbitrary in selecting the victims of discrimination, a State can get away with both arbitrariness and discrimination." *Boykin* Brief, *supra*, at 54.

juries.[18] If the arbitrariness and discrimination infecting the administration of the death penalty are to be regulated, it must therefore be through judicial scrutiny of the procedures that permit and encourage such arbitrariness and discrimination.

This brings us to our third point relating to the significance of the evidence of arbitrary and discriminatory capital sentencing. Herbert Wechsler has observed that: "most dramatically when life is at stake, equality is a most important element of justice." *Symposium on Capital Punishment,* 7 N.Y.L.F. 250, 259 (1961). The Fourteenth Amendment makes it an indispensable element of justice under the Constitution; and the Due Process Clause particularly is designed to assure the regularity of procedures necessary to control against uneven and unfair, arbitrary impositions upon the individual.

What is in issue in this case is the essential fairness, regularity and even-handedness required by Due Process in proceedings by which the state determines to take human life. Where the consequences of the use of those procedures are marked by what the court of appeals below acknowledged were "recognizable indicators . . . that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it" (A. 63)—where an extensive, painstaking and rigorous scientific study of the application of those pro-

[18] The opinion of the court of appeals below makes the point extraordinarily well. It rests principally on the proposition that the court cannot detect actual racial motivation on the part of the particular jury which condemned petitioner to die. See A. 59-64. Any such work of detection would, of course, be impossible because the entire absence in Arkansas law of standards governing the jury's sentencing decision precludes appraisal of the propriety of the decision, hence the inference of discrimination which might attach to an otherwise inexplicable act of impropriety.

cedures "casts considerable doubt upon the quality of justice in those particular cases throughout the system"[19]—surely the procedures which allow these uses and consequences call for the most critical and searching scrutiny of which courts are capable, to assure consistency with Due Process. Such scrutiny, as we shall now show, finds Arkansas' capital sentencing procedures drastically deficient.

I.

Arkansas' Practice of Allowing Capital Trial Juries Absolute and Arbitrary Power to Elect Between the Penalties of Life or Death for the Crime of Rape Violates the Rule of Law Basic to the Due Process Clause.

Reading the formal provisions of Arkansas statutory law governing punishment for the crime of rape, it is easy to be lulled into a quite misleading frame of mind. The statutes say, in effect, that the penalty for rape is death, except that the jury may instead elect to sentence a defendant convicted of rape to life imprisonment. ARK. STAT. ANN. §§41-3403, 43-2153 (1964 Repl. vol.), p. 3 *supra*. The image conveyed is that death is the ordinary and usual consequence of a rape conviction, while the sentence of life imprisonment is some form of extraordinary dispensation from the true course of the law.

This image is as dangerous as it is wrong. Its danger lies not primarily in the sort of simplistic legal reasoning which has sometimes been supposed to be applicable to it: that a dispensing procedure which grants a gratuitous benefit, rather than imposing a burden, escapes the con-

[19] Dr. Marvin E. Wolfgang, testifying on cross examination below (Tr. 81), quoted by the court of appeals at A. 53. Compare the phraseology of the court of appeals relative to "suspicion . . . with regard to southern interracial rape trials as a group over a long period of time." (A. 61-62.)

trol of constitutional safeguards designed to protect the individual from arbitrary and overreaching state action. We do not suppose that this Court would for a moment countenance any such legal argument.[20] The more insidious danger of the image is a subtle attitude which it engenders, that the process of decision-making by which life or death is selected as the penalty for crime is not really terribly important. The defendant, after all, has been convicted of an offense whose punishment is death—although some few defendants may be exempted from the actual necessity of dying. This attitude fosters a view of the procedures for selecting the men who will live and the men who will die, from among the total number of men convicted of capital offenses, that is both unreal and irresponsible.

We hope that there can be no doubt about the facts. The penalty for rape is not death—in Arkansas or anywhere else. Only one quarter of the total number of Arkansas rape convictions analyzed by Dr. Wolfgang resulted in a death sentence.[21] The twenty-five per cent figure is probably somewhat high even for Arkansas;[22]

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[20] The Fourteenth Amendment's requirements of fairness and equality apply not merely to such "rights" as a state is federally compelled to give its citizens, but also to the processes of dispensing such benefits as the state may choose to give them, however gratuitously. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); *Watson* v. *City of Memphis*, 373 U.S. 526 (1963); *Cox* v. *Louisiana*, 379 U.S. 536, 555-558 (1965). The principle has been applied to criminal sentencing, *United States* v. *Behrens*, 375 U.S. 162 (1963), and to capital sentencing in particular, *Brady* v. *Maryland*, 373 U.S. 83 (1963). So, even if the view is indulged that Arkansas' capital sentencing procedures do no more than allow the conferring of the benefit of life to a convicted defendant, those procedures are nonetheless constrained by the Due Process and Equal Protection Clauses, as *Brady* squarely holds.

[21] See Petitioner's Exhibit P-4, Appendix B, table 1. There were fourteen death sentences imposed in a total of fifty-five cases.

[22] The fifty-five cases mentioned in the preceding footnote are all of those analyzed by Dr. Wolfgang. A few cases found on the

and it appears far higher than the percentage of rape convicts who are sentenced to death in other states where the offense is potentially capital.[23] It is also true that the penalty for first-degree murder is not death—in Arkansas or anywhere in the United States.[24] By far the greater number of first-degree murder convicts, like rape convicts, are sentenced to some punishment other than death.[25] The testimony of Attorney General Clark, quoted at p. 12 *supra*, was neither heedless nor uninformed: "Most persons convicted of the same crimes [for which "a small and capricious selection of offenders have been put to death"] have been imprisoned."

What is important here is not the respective percentages of men sentenced to life and to death (we shall recur to their significance shortly), but rather the point that a highly selective process of making individuating judgments is occurring, called forth by a state's statutes which give its juries the option between a death sentence and something less. This process begins at the point of a defen-

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docket books could not be analyzed, because information relating to the critical variables was not discoverable. These were ordinarily non-death cases, since official record-keeping in death cases tends to be more fulsome.

[23] See Appendix B, pp. 24a-34a *infra*.

[24] The death penalty for first-degree murder is no longer mandatory anywhere in the United States. See BEDAU, THE DEATH PENALTY IN AMERICA (1964) 27-30, 45-52.

Indeed, there are very few crimes in the United States today that carry a mandatory death penalty, and those few are for the most part of the obscure sort under which no one is ever charged (treason, in several states; perjury in a capital case, etc.). See *ibid.* And see KALVEN & ZEISEL, THE AMERICAN JURY (1966) 301, 435; Hartung, *Trends in the Use of Capital Punishment*, 284 ANNALS 8 (1952); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953).

[25] See Appendix B, pp. 24a-34a *infra*.

dant's conviction for a capital crime; it applies to all defendants so convicted; and it involves the making of differentiations between them, choosing those ones among their total number whose lives are to be taken.

The question is not worth debating whether the Fourteenth Amendment's basic requirements of regularity, fundamental fairness, and even-handedness operate as constraints upon such a process of selection. Obviously, they do. *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968); *Brady* v. *Maryland*, 373 U.S. 83 (1963). And see *Specht* v. *Patterson*, 386 U.S. 605 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942). As Judge Sobeloff has written in another connection:

> "Under our constitutional system, the payment which society exacts for transgression of the law does not include relegating the transgressor to arbitrary and capricious action." (*Landman* v. *Peyton*, 370 F.2d 135, 141 (4th Cir. 1966).)

The issue is whether the selection process used by the State of Arkansas—and by most other American states which retain capital punishment, we must add—comports with the relevant Fourteenth Amendment constraints or "relegates the transgressor to arbitrary and capricious action" in the manner of deciding whether he lives or dies.

We therefore pass to an examination of the Arkansas process.

A. *The Power Given Arkansas Juries Is Essentially Lawless.*

1. ARK. STAT. ANN. §41-3403 (1964 Repl. vol.), p. 3 *supra*, fixes the punishment for rape as death. Pursuant to ARK. STAT. ANN. §43-2153 (1964 Repl. vol.), p. 3 *supra:*

> "The jury shall have the right in all cases where the punishment is now death by law, to render a verdict of life imprisonment. . . ." [26]

This option conferred upon the jury is the exclusive method of selecting, among convicted capital offenders, the ones who die. A jury trial may not be waived in a capital case in Arkansas. ARK. STAT. ANN. § 43-2108 (1964 Repl. vol.); *Scarber* v. *State*, 226 Ark. 503, 506, 291 S.W.2d 241, 242-243 (1956).

2. The only procedural requisite for valid exercise of the option is that the jury must be told it has a choice between life imprisonment and death.[27] It is apparently sufficient, to meet this requirement, that the court hand the jury alternative life and death verdict forms, identify them, and tell the jury it may use either. *Smith* v. *State*, 230 Ark. 634, 642-643, 324 S.W.2d 341, 346 (1959). The Arkansas Supreme Court has expressly approved submission of the penalty option to the jury under instructions which do nothing more than tell the jury it has a choice. *Hays* v. *State*, 230 Ark. 731, 736, 324 S.W.2d 520, 523-524 (1959) ("' . . . it will be your duty to assess the punishment. The punishment for murder in the first degree is

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[26] The predecessor of this section, first giving juries capital sentencing discretion in Arkansas, was enacted in 1915. Arkansas Acts 1915, No. 187, §1, at p. 774.

[27] *Alford* v. *State*, 223 Ark. 330, 266 S.W.2d 804 (1954); *Smith* v. *State*, 205 Ark. 1075, 172 S.W.2d 248 (1943); *Crowe* v. *State*, 178 Ark. 1121, 13 S.W.2d 606 (1929); *Webb* v. *State*, 154 Ark. 67, 242 S.W. 380 (1922). In murder cases, it is also required that the jury be told to determine the degree of the offense; and an explicit first degree verdict is necessary to support a death sentence. *Walton* v. *State*, 232 Ark. 86, 334 S.W.2d 657 (1960); *Jones* v. *State*, 204 Ark. 61, 161 S.W.2d 173 (1942); *Ray* v. *State*, 194 Ark. 1155, 109 S.W.2d 954 (1937); *Wells* v. *State*, 193 Ark. 1092, 104 S.W.2d 451 (1937); but see *Burns* v. *State*, 155 Ark. 1, 243 S.W. 963 (1922).

death by electrocution or, at the option of the jury, imprisonment in the penitentiary for the term of his natural life.'"); *Hodges* v. *State,* 210 Ark. 672, 674, 197 S.W.2d 52, 53 (1946) ("'Gentlemen of the jury, if you wish to return a verdict of guilty and fix the punishment at death, your verdict will be [reciting verdict form]: . . . If you wish to return a verdict and fix the punishment at life imprisonment, you will return the following verdict [reciting verdict form]. . . .'").[28] No Arkansas cases have been found in which more elaborate instructions were given.

3. Arkansas Supreme Court decisions describing the nature of the option given to the jury are little more informative. They do no more than to recite the obvious propositions that: "The legislature evidently meant for the jury to exercise its discretion in selecting the punish-

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[28] In *Boone* v. *State,* 230 Ark. 821, 825-826, 327 S.W.2d 87, 89-90 (1959), the jury interrupted its deliberations to inquire of the judge which was the maximum penalty in law, life imprisonment or death. The following transpired:

> "'By the Court: No, no, sir the law doesn't say. The law simply says that the penalty shall be life imprisonment in the event of a finding of guilty, or the penalty shall be death in the event of a finding of guilty. It leaves it to the jurors to decide which of these penalties shall be inflicted.'
>
> . . .
>
> "'By the Court Reporter: (Reading) Gentlemen of the Jury, you have asked the court to tell you at this state of your deliberations which is considered in law to be the most severe penalty. Whether it is death by electrocution, or whether it is life imprisonment. Our statutes provide that every person convicted of murder in the first degree shall suffer death or life imprisonment. It is for you, the jury, to say which of these two penalties should be inflicted, the severity of either of those punishments is a matter for each of you to decide to your own satisfaction.
>
> "'By the Court: Gentlemen, are there any other questions?
>
> "'By Member of the Jury: You didn't help us much.
>
> "'By the Court: I am sorry, but I have got to go by the law.'"

ment . . ." (*Needham* v. *State,* 215 Ark. 935, 939, 224 S.W.2d 785, 787 (1949); see *Webb* v. *State,* 154 Ark. 67, 72-75, 242 S.W. 380, 383-384 (1922)), and that "this option lies entirely with the jury." *Alford* v. *State,* 223 Ark. 330, 332, 266 S.W.2d 804, 805 (1954)). The only Arkansas case found which discourses more fully on the nature of the option is *Scarber* v. *State,* 226 Ark. 503, 505, 291 S.W.2d 241, 242 (1956), where the Supreme Court said that a jury charge requiring that the jurors not impose the death penalty unless satisfied beyond a reasonable doubt that the defendant should receive it "placed a greater burden on the state than it was required to assume under the law."

4. One point is quite clear however. The jury's judgment is entirely unreviewable.[29] Although the Arkansas Supreme Court has spoken of its power to "reduce a punishment imposed upon the verdict of a jury . . . on account of . . . excessive punishment," *Blake* v. *State,* 186 Ark. 77, 80-82, 52 S.W.2d 644, 646 (1932), it has repeatedly made clear that this power may be exercised to reduce a death sentence only where (as in *Blake*) the evidence is insufficient to sustain a jury verdict of *conviction* of the capital charge. E.g., *Smith* v. *State,* 230 Ark. 634, 643-644, 324 S.W.2d 341, 346 (1959).[30] Otherwise, with regard to the death penalty, "as we have many times stated, the matter of assessing punishment is strictly within the province of the jury, and we have no power

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[29] "The statute gives the jury, and not the court, the right to reduce the punishment. . . ." *Burns* v. *State,* 155 Ark. 1, 8, 243 S.W. 963, 967 (1922) (dictum). *Accord: Webb* v. *State,* 154 Ark. 67, 72, 242 S.W. 380, 383 (1922) (dictum).

[30] Where the evidence will not support conviction on the capital charge but will support conviction of a lesser included offense, the Arkansas Supreme Court reduces the penalty to that provided by law for the lesser offense. This is not, of course, review of the sentence but of the conviction.

to change the fixed punishment unless the proof fails to sustain the charge for which the defendant is convicted." *Nail* v. *State*, 231 Ark. 70, 85, 328 S.W.2d 836, 845 (1959). *Accord: Smith* v. *State*, 230 Ark. 634, 324 S.W.2d 341 (1959); *Young* v. *State*, 230 Ark. 737, 324 S.W.2d 524 (1959); *Hildreth* v. *State*, 215 Ark. 808, 223 S.W.2d 757 (1949); *Rorie* v. *State*, 215 Ark. 282, 220 S.W.2d 421 (1949); *Palmer* v. *State*, 213 Ark. 956, 214 S.W.2d 372 (1948); *Allison* v. *State*, 204 Ark. 609, 164 S.W.2d 442 (1942); *Turnage* v. *State*, 182 Ark. 74, 30 S.W.2d 865 (1930).[31] See also *Hays* v. *State*, 230 Ark. 731, 324 S.W.2d 520 (1959); *Hodges* v. *State*, 210 Ark. 672, 197 S.W.2d 52 (1946).[32] This powerlessness of the Arkansas Supreme Court to review a death sentence stands in sharp contrast to its freely exercised power to reduce jury-fixed sentences in non-capital cases.[33]

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[31] The only death case in which the Arkansas Supreme Court has ever assumed to reduce the penalty without upsetting the conviction is *Davis* v. *State*, 155 Ark. 245, 244 S.W. 750 (1922). In *Davis*, the Supreme Court disbelieved the complaining witness in a rape case and responded by granting clemency to the defendant. Its power to do so was later repudiated, and *Davis* expressly overruled, in the *Allison* case, text *supra*, 204 Ark., at 614; 164 S.W.2d, at 445.

[32] It is in the context of this line of decisions that one must read the phrase in *Ezell* v. *State*, 217 Ark. 94, 102, 229 S.W.2d 32, 36 (1950), declining to reduce a death sentence fixed by a jury, "if it be conceded that we have such power." See also *Black* v. *State*, 215 Ark. 618, 625, 222 S.W.2d 816, 820 (1949).

[33] *Carson* v. *State*, 206 Ark. 80, 173 S.W.2d 122 (1943); *Hadley* v. *State*, 205 Ark. 1027, 172 S.W.2d 237 (1943); *Marks* v. *State*, 192 Ark. 881, 95 S.W.2d 634 (1936); *Ball* v. *State*, 192 Ark. 858, 95 S.W.2d 632 (1936); *Hudspeth* v. *State*, 188 Ark. 323, 67 S.W. 2d 191 (1934). Even where the court refuses to reduce a jury-fixed non-capital sentence, it does not talk of lack of power; it finds no "abuse of discretion" by the jury, *Cook* v. *State*, 225 Ark. 1003, 287 S.W.2d 6 (1956); *Wilkerson* v. *State*, 209 Ark. 138, 189 S.W.2d 800 (1945); *Cheney* v. *State*, 205 Ark. 1049, 172 S.W.2d 427 (1943), and concedes that "we may reduce extreme penalties when not supported by the evidence," *Smith* v. *State*, 194 Ark. 1041, 1045, 110 S.W.2d 24, 26 (1937).

5. Describing the Arkansas death-sentencing practice, used at petitioner Maxwell's trial, the district court below wrote:

> "It may be conceded that the Arkansas statutes dealing with rape and dealing with capital punishment do not purport to set up any standards by which the jury is to exercise its discretion in determining whether it should exercise the power conferred upon it by section 43-2153, and it will be assumed that no such standards are to be found in the reported decisions of the Supreme Court of Arkansas. Nor did the Circuit Court in its charge to the jury attempt to lay down any principles which should be applied in determining whether petitioner, if convicted, should be punished by life imprisonment rather than by death." (257 F. Supp. at 716; A. 30.)[34, 35]

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[34] Although the transcript of petitioner's state trial has not been included in the materials certified to this Court by the Court of Appeals for the Eighth Circuit, it was before the District Court in petitioner's earlier federal habeas corpus proceeding, see 229 F. Supp. 205, and hence by agreement available to the district court in the present proceeding (A. 17). The district court refers to it in the quoted passage, and in stating, for example, that petitioner did not testify at his trial (A. 41). The Court of Appeals sent for the transcript while the appeal was under submission, and its opinion refers explicitly to it (A. 59, n. 5). For the information of the Court, we set forth in Appendix C the manner in which the sentencing option was submitted to petitioner's trial jury.

[35] In a footnote to this passage, the district court adds: "It does not appear that counsel for petitioner requested any instructions on the subject." (257 F. Supp. at 716, n. 6; A. 30, n. 6.) The court of appeals also noted that "the defense in Maxwell's rape trial requested no instructional standards." (398 F.2d, at 149; A. 65.) But neither court found that petitioner had thereby committed the sort of intentional bypassing required to forfeit federal claims under *Fay* v. *Noia*, 372 U.S. 391 (1963); and no such finding could be made. Petitioner's constitutional complaint is that there are no standards fixed by Arkansas law to govern the jury's death-penalty decision, and in the absence of such standards,

We note the salient characteristics of the death-sentencing process just described.

First, the objective of the process is to differentiate among individuals, in order to select from the total number of men convicted of rape those who will live and those who will die. The purpose for which this differentiation is made is the most arcane, the most intractable judgment known to the criminal law. "It should be understood that much more is involved here than a simple determination of sentence. For the State . . . empowered the jury in this case to answer 'yes' or 'no' to the question whether this defendant was fit to live." *Witherspoon* v. *Illinois,* 391 U.S. 510, 521 n. 20 (1968).

The ends thought to be served by capital punishment—hence, the considerations which bear on the fitness of prescribing it in a particular case—are variable, and hardly a matter controlled by consensus or enlightened by the commonly shared values of our society. Arkansas' legislature has not identified the ends which it thinks worthy of consideration in support of its general decision to retain the death sentence for the offense of rape; nor has it proscribed consideration of whatever other ends may occur to individual men sitting in judgment in rape cases. The sentencer is informed only by his personal intuition and particularistic experience concerning the goals in whose interest he is empowered to kill other men. Sentencing in non-capital cases—however complex the judgments it may require—at least rests upon the common assumption that the offender is to be salvaged if he is salvageable consistently with community protection. Capital sentencing

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counsel could not have conceived what to request the court to charge on the issue. Surely, counsel was not required to make up his own standards, in order to supply the deficiency of Arkansas' legislation.

rejects that assumption, in the case of some men but not others, without explaining who or why.

Second, the consequences to the individual who is sentenced to die are far less recondite than the objectives which may, or may not, underlie the decision to kill him. "Whatever the differences on which this decision hinges, they remain demeaningly trivial compared to the stakes." KALVEN & ZEISEL, THE AMERICAN JURY (1966) 448-449. The enormity of the stakes is altogether obvious.[36]

Third, the range of cases and convicted defendants subject to the selection process, and among whom it operates to differentiate, is extraordinarily broad. The crime of rape in Arkansas (as in other states where it is capital) encompasses every variety of consummated sexual assault, whether on a child or a mature woman, whether the victim is brutally injured or physically unharmed, whether the assailant is a prowling stranger or the victim's social companion.[37] The range of capital murder cases is similarly

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[36] We think we need not elaborate the point before this Court, which has so frequently recognized it. *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *Williams* v. *Georgia*, 349 U.S. 375, 391 (1955); *Stein* v. *New York*, 346 U.S. 156, 196 (1952); *Chambers* v. *Florida*, 309 U.S. 227, 240 (1940); *Powell* v. *Alabama*, 287 U.S. 45 (1932).

[37] The Arkansas statute in effect from 1842 until 1967 defined rape in terms of Blackstone's venerable formulation as "the carnal knowledge of a female, forcibly, and against her will." ARK. STAT. ANN. § 41-3401 (1964 Repl. vol.). But, in this formulation, "forcibly" means nothing more than the degree of force necessary to achieve intercourse, and "against her will" signifies only "without her consent." This is the doctrine generally followed by states which retain the common-law formulation of rape, see PERKINS, CRIMINAL LAW (1957) 110-112, 119-127; and it is the rule announced by the Arkansas cases. *McDonald* v. *State*, 225 Ark. 38, 279 S.W.2d 44 (1955); *Fields* v. *State*, 203 Ark. 1046, 159 S.W.2d 745 (1942); *Davis* v. *State*, 155 Ark. 245, 244 S.W. 750 (1922); *State* v. *Peyton*, 93 Ark. 406, 125 S.W. 416 (1910); *Harvey* v. *State*, 54 Ark. 425, 14 S.W. 645 (1890).

In 1967, Arkansas enacted a new statute dividing rape into degrees but not materially affecting the nature of the charge which

broad.[38] It is quite inconceivable that the legislature which authorized the death penalty in all of these cases thought that it should be used in very many of them. And, indeed, it is used in practice in only a relatively small number.[39] The prescription of the death penalty, with its discretionary incidence, is therefore a striking example of purposive overbreadth—that style of legislation which sweeps far more broadly than its intended target, leaving to *ad hoc* judgment in administration the job of deciding what that target shall be.[40]

Fourth, in the case of the death penalty, the instrument of administration is the lay jury, selected to try a partic-

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constitutes the capital degree. Arkansas Acts 1967, No. 362, p. 830, codified as ARK. STAT. ANN. §41-3401 (1968 Cum. Supp.). First degree rape, which is capital, consists of sexual intercourse with a female "by forcible compulsion," or where the female is "incapable of consent by reason of being physically helpless, or mentally incapacitated," or is less than eleven years old. Second and third degree rape, which are non-capital, involve intercourse, whether or not consensual, with females under the ages of 14 and 16 respectively.

[38] Arkansas has the common form of first degree murder statute, ARK. STAT. ANN. § 41-2205 (1964 Repl. vol.), encompassing murders by poison or lying in wait, felony-murders (arson, rape, robbery, burglary or larceny), and deliberate and premeditated murders. The State follows the widely accepted notion that "premeditation and deliberation to do murder may be formulated in the assailant's mind upon the instant. It does not have to exist in the mind an appreciable length of time." *Nail* v. *State*, 231 Ark. 70, 75, 328 S.W.2d 836, 839 (1959). *See House* v. *State*, 230 Ark. 622, 324 S.W. 112 (1959); *Jenkins* v. *State*, 222 Ark. 511, 261 S.W.2d 784 (1953); *Gilchrist* v. *State*, 100 Ark. 330, 140 S.W. 261 (1911); *Rosemond* v. *State*, 86 Ark. 160, 110 S.W. 229 (1908); *Green* v. *State*, 51 Ark. 189, 10 S.W. 266 (1889). Consequently, as Mr. Justice Cardozo pointed out many years ago, the line between second and first degree murder is paper thin; and virtually all murders are potential first degree cases if the jury takes that view of them. CARDOZO, LAW AND LITERATURE (1931) 97-101.

[39] See Appendix B, pp. 24a-34a *infra*.

[40] This Court has pointed out that such legislation is inherently "susceptible of sweeping and improper application." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 433 (1963).

ular case. In pointing out this circumstance, we imply no general criticism of trial by jury. Recognition of the unique virtues of jury trial, see *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), does not preclude the simultaneous recognition that jury trial also has certain peculiar dangers, requiring especial safeguards under the Constitution. See *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Bruton* v. *United States*, 391 U.S. 123 (1968). And it can hardly be doubted that the jury system, for all of its merits, is that form of judicial process which is least capable of developing uniform and consistent rules of decision.[41]

Comparison of the jury with a sentencing judge is instructive in this regard—and none the less because sentencing by judges in this country has itself fallen far short of the marks of regularity and even-handedness.[42] The judge, at least, is a professional sentencer. The very fact that he sentences a considerable number of offenders promotes some consistency in their sentencing, even if it be only the consistency of his habits. In the process, hopefully, he gains some generalizable experience, develops bases for rational comparative judgments; in any event, minimally, he evolves a "feel" for how the cases "line up." As a professional, he is somewhat better guarded against unexamined visceral urges and inflammable emotions than are

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[41] The point has been succinctly stated, with particular reference to jury sentencing, by the cognizant Task Force of the National Crime Commission. "[T]he transitory nature of jury service virtually precludes rational sentencing." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967) 26.

[42] See, e.g., Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55 (1966); INSTITUTE OF JUDICIAL ADMINISTRATION, DISPARITY IN SENTENCING OF CONVICTED DEFENDANTS (1954).

lay jurors.[42] He shares with other judges and sometimes with corrections personnel a sense of common enterprise and responsibility in regard to sentencing offenders that can be, and often is, a regularizing influence. He talks with other judges; lawyers talk to him about his sentencing practices and theirs; he has contact with corrections people; and he can be affected, as well, by more formal controls and guides:—occasional instances of appellate sentencing review or expressed disapprobation, sentencing conferences and councils, etc. Notwithstanding all of these moderating forces, as we have said, judicial sentencing often is extremely erratic. How much more erratic and uneven then must jurors natively tend to be, who are subject to not a single one of the controls working on the judge? A unique array of twelve untrained individuals assembles; hears one case; sentences one man; then disperses. We repeat that we would not in the least disparage jurors' functioning in this fashion to decide issues—whether factual, judgmental or moral—adequately framed by uniform rules of law. But the prospect that, *without rules*, the jurors will themselves supply uniformity or regularity, is hopeless.

Fifth, in making its selection of the men to die, out of all those convicted, the jury is ordinarily deprived by Arkansas' single-verdict procedure of information that is necessary to any sort of rational selective judgment. We develop this point independently in Part II, pp. 66-78 *infra;* but it must be considered, together with the points made

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[42] "The judge very often perceives the stimulus that moves the jury, but does not yield to it. Indeed it is interesting how often the judge describes with sensitivity a factor which he then excludes from his own considerations. Somehow the combination of official role, tradition, discipline, and repeated experience with the task make of the judge one kind of decider. The perennial amateur, layman jury cannot be so quickly domesticated to official role and tradition; it remains accessible to stimuli which the judge will exclude." KALVEN & ZEISEL, THE AMERICAN JURY (1966) 497-498.

in paragraphs *First* through *Fourth* above, as composing the background and concrete setting within which Arkansas juries exercise the "option" or "discretion" allowed them in capital sentencing. Having sketched the background, we now come to that "discretion," which is the nub of our constitutional complaint.

Sixth, the power of life-or-death decision given to the jury is absolutely lawless. It is a raw, arbitrary power to kill or to let live, unguided by principle, undirected by concern for specified relevant facts, uncontrolled by any general rules of law, unleashed of any requirement that it be exercised pursuant to valid reasons or even to agreed-upon reasons (since the twelve jurors may vote to kill for twelve disparate reasons), and uncontrollable, unreviewable by any other power in the legal system. It is, simply, the power to take away a convicted man's life for any reason (good or bad, rational or irrational, generally applicable or trotted out for the occasion) or for no reason at all—on a whim, a caprice—or because the defendant did not take the witness stand; because he took the stand, slanderously claimed consent, and was disbelieved; or because of the color of his skin.

Let us examine more closely the nature of this extraordinary "discretion."

> (1) Its exercise is not required to rest upon any prerequisite findings of fact. Such findings, of course, are required to support virtually every other judgment of a jury in our legal system. "If you find that the defendant did strike the plaintiff with his car . . ."—thus runs the archetypal jury charge. The requirement of factual findings serves both to guide the conscientious juror and to provide a basis for judicial control by review of the unconscientious one. But a death-sentencing jury need find no facts, either of a specific

sort (for example, that the rape resulted in substantial bodily harm to the victim;[44] or that the defendant has been convicted, or has committed, other rape offenses[45]), or of a more general sort (for example, that the defendant is a likely rape recidivist, or that he is incapable of rehabilitation).

(2) Nor is there any legal prescription, to guide the jury or enable review of its judgment, of any *preclusive* factual findings: circumstances that exclude the death penalty (for example, the defendant's youth; or conduct by the victim which led the defendant on).

(3) Nor is the jury required to consider, or to take account of, any specified facts or concerns.

(4) Nor is there any enumeration, for the jurors, of specified facts or concerns which they *may* consider. The jury's attention is not directed to any range or realm of available factual or judgmental considerations.

(5) Nor is there enumeration and proscription of *im*permissible considerations. The jury is not told that it may not sentence the defendant to death for his unregenerate bad taste in taking the stand and perjuriously claiming consent; or for not taking the stand.

(6) There is no prescription of guiding criteria, legal norms, standards or principles for judgment. In

[44] The State of Nevada requires such a finding as the precondition of the imposition of a death sentence in a rape prosecution. See note 13 *supra*.

[45] This is the sort of finding required to support the imposition of the harsher penalty allowable under common state legislation dealing with recidivists.

some areas of law, where legal doctrine can do no better, jurors are permitted to employ such general standards as "reasonable care" or "the conduct of a reasonable man." These standards are imprecise, but they *are* standards; they serve to tell the jury what the law has determined is the test or benchmark by which the defendant is to be judged. The defendant is liable to the plaintiff if he did not act with the degree of care which a reasonable man would have employed; the jury may decide (within limits) what that degree of care is, but they are told that they must not find against the defendant if he exercised it. No equivalent guidance is provided to the death-sentencing jury. It may—indeed, it must—make up its own governing principles, which may or may not be those that other juries apply to other convicted men. In fact, not even this much rational deliberation is required, for it is illusory to speak about the death-sentencing "jury" and "its" governing principles. The jurors are not directed or required to discuss or to agree upon any common set of principles; and the court's instructions (unlike even such formulations as the "reasonable man") give them nothing to focus any such discussion.

> "The precise point which prompts the penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded twelve times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.
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> " . . . Such factors as the grotesque nature of the crime, the certainty of guilt, or the arrogant behavior of the defendant may conceivably have assured the death penalty. . . . Yet who can say

that these very factors might not have demonstrated to a particular juror that a defendant, although legally sane, acted under the demands of some inner compulsion and should not die? . . ." (*People* v. *Hines*, 61 Cal.2d 164, 169, 390 P.2d 398, 402, 37 Cal. Rptr. 622, 626 (1964).)

(7) There is no prescription even of the ultimate legal goals and purposes to be considered in the formulation of criteria to guide the death-sentencing decision. Anglo-American law addresses its vaguest sort of directions to courts in such matters as child custody cases, where the "best interests of the child" or some equivalent formulation is the touchstone, or in economic regulation, where "unreasonable" restraints of trade are forbidden. Death-sentencing jurors have not even the direction and delimitation, the concentration of attention upon specified general objectives, which these vague formulations comport. Rather, the power of life-or-death decision is wholly unguided and unconstrained, unlike any other decision made by a lawful tribunal within our legal traditions.[46] It can only be likened to the power that would be conferred by a practice—inconceivable in any American court—of submitting to a jury in a civil case the naked ques-

[46] See KALVIN & ZEISEL, THE AMERICAN JURY (1966) 435:

"The discretion which the [death-sentencing] jury in the United States is asked to exercise is, it should be emphasized, striking: there is neither rule nor standard to guide it. For this reason, comparison of judge and jury decision must here depart from the standard pattern of analysis which discussed disagreement in terms of why the jury differed from the judge. We have viewed the latter [in all sorts of other legal judgments] as a kind of baseline representing the law, and we have tried to trace the nuances of jury judgment as it deviated from the legal norm of the judge. For the death penalty, however, the judge is not 'the law' but merely another decider. In no meaningful sense can it be said that the judge's decision is more representative of the law than is the jury's."

tion: "Should the defendant be liable to the plaintiff?" —or, in a criminal matter: "Has the defendant done something for which he should be punished?"

> "We wouldn't turn it over to a jury, the determining of whether the father or the mother or whether the grandmother or a sister-in-law got the child, according to the absolute whim or caprice, or, as you put it, the discretion of the jury. We wouldn't turn over to the whim of a jury the determination of whether a fox terrier belonged to the husband or the wife in a separation. We wouldn't let a jury determine that with absolute discretion. Any issue in the whole legal system that you can think of, rights, property rights, personal rights, are guided by precedents, by standards, and to leave to a jury the absolute discretion to determine whether a person lives or dies, without any guidance, or any compass or standard, principles or anything else, is foreign to the whole basic tradition of the Anglo-Saxon common law. That is the hurdle you have to face and that the Court has to meet in passing on this question." [47]

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[47] We quote this passage because it summarizes better than anything written on the subject, and better than anything we could say, the nature and the vice of standardless discretion in capital sentencing by a jury. The passage is a transcription of a statement by Chief Justice Traynor during a colloquy with the Assistant Attorney General of California in the course of the argument in *In re Anderson*, —— Cal.2d ——, 447 P.2d 117, 73 Cal. Rptr. 21 (1968), a case discussed at pp. 45-56 *infra*. See Transcript of Proceedings in the Supreme Court of California, *In re Anderson*, Crim. No. 11,572, March 28, 1968, pp. 107-108. However, because questions asked from the bench may convey a misleading impression of a judge's views, and because we would not wish to run the slightest risk of misrepresenting those of Chief Justice Traynor —even while using his words exclusively for the purpose of expressing our own thoughts—we feel obliged to set forth here two subsequent, related passages in the colloquy:

> "CHIEF JUSTICE TRAYNOR: I wonder if you were making this argument, Mr. Harris. I don't want to put words into

(8) There is no review of the jury's decision, and no judicial safeguard of any sort against invidious discriminations and other abuses. It is therefore not sur-

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your mouth. You look at this problem of standards right in the face and it's awfully easy to talk about ships without rudders or compass, boats without oars and so forth, and about assigning a fox terrier to one person or another without standards, but in this area you just can't find workable standards. Any kind of formula that you put up would simply be magic words, at best. We haven't heard of any precise standards that wouldn't be like mouthing formulas to the jury that it should take into consideration such and such factors and so forth. You can't get anything as precise as a rudder or an oar and so forth. That being the case, the question is whether you are going to have death or not. The State could say that every killing or certain killings, just automatically brought on the death penalty. The present system is a dispensation that the State has made. It is futile to think of standards. I don't know whether you make that argument or not.

. . . . .

"CHIEF JUSTICE TRAYNOR: Let me see if I can restate your argument about discretion, that there are many instances, as you pointed out, where matters are left to the discretion of the trial judge, and that is because the appellate courts, in their wisdom and experience, don't know what precise standards should be set down, because they are not—they haven't had enough experience, haven't had enough cases to lead them, haven't had enough specific items. So when the appellate court doesn't know the answer, it turns the matter over to the discretion of the trial judge, just as in many instances when we don't know the answer to a real tough question, we turn it over to a jury.

"Now, here is the toughest question of all that human beings have to face, as to whether a man should die or not. A man, say, who has thrown gasoline into a tavern and caused, say, seven or eight people to be burned; a man who rapes a girl and savagely cuts her up; who does all of the other heinous things that some of these people have been convicted of.

"Now, the question is this: Should that person die or not? Where are you going to get the guidance that is going to tell you whether a person should die or not?

"Maybe the answer is that because you have no answer, a civilized society wouldn't have the death penalty. But you might retaliate to that, that is really a question for the legislature, but on this question of standards it is impossible to

prising that the performance of jurors in the exercise of the lawless discretion given them is not merely irregular[48] and arbitrary in particular cases,[49] but ex-

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articulate a standard. Of all the questions that could be propounded to mankind, this is one which would defy a Solomon."

(*Id.*, at pp. 113-114, 120-121.) We might add, concerning this last quoted passage, that again in our judgment it goes directly to the heart of the matter. We quite agree that common experience furnishes no easy answers relating to the standards that should govern capital sentencing. All the more reason, we have suggested, why the death-sentencing decision cannot properly be left to the unguided decisions of individual juries. (See pp. 33-34 *supra*.) We deny that it would be impossible for a legislature to provide standards governing capital sentencing, if the legislature gave the matter proper attention and had rational ultimate goals in authorizing capital punishment as the available penalty in any case. (See note 67 *infra*.) However, if the nature of the death penalty, or of a legislature's reasons for ordaining it, is such that no regular, rational, even-handed policies of general applicability can be formulated to govern its administration—with the necessary result that individuals must be condemned to die irregularly, irrationally, unevenly: in short, arbitrarily and without due process of law—then it is our view precisely that the Due Process Clause forbids a civilized society to use this sort of penalty. If a sanction's use *cannot* be made consistent with due process, the Constitution of the United States makes quite clear that the sanction, not due process, must be abandoned.

[48] See KALVEN & ZEISEL, THE AMERICAN JURY (1966) 437-449. Examining jury penalty decisions in 111 death cases, and the presiding judges' evaluations of them, Kalven and Zeisel find that jurors and judges agree on a sentence of imprisonment in 76 cases, agree on death in 14, and disagree in 21. Significantly, therefore, where death is the outcome, there is more often disagreement than agreement. Patterns in jury sentencing emerge, in the sense that death-sentence cases are frequently characterized by the same sorts of aggravating circumstances. But these same factors appear in many cases where the death sentence is not imposed. "Many of the murder cases in which the judge and jury disagree on the death penalty appear no less heinous than those in which they agree." *Id.*, at 439. "The leniency categories have a plausible ring. But the brute fact is that each time one of the factors listed was persuasive to one of the deciders, it was unpersuasive to the other. Either the judge or the jury was willing, despite the presence of the leniency-disposing factor, to have the defendant executed." *Id.*, at 444.

[49] See pp. 11-13 *supra*.

hibits grossly unconstitutional discriminations[50] which the courts have been unable to control or correct. We put aside, for present purpose, the question whether a state is federally obligated to provide at least some minimal form of judicial review of a jury's determinations;[51] or whether, if its highest court freely reviews jury-fixed sentences in non-capital cases (as does Arkansas'), it may deny all power of review in capital cases alone.[52] The point we make here is that a total absence of standards to govern the jury's decision-making function—a defect that would defeat any meaningful judicial review which is allowed—is the more baneful, if possible, where there is no judicial review. The jury makes the one and only judicial decision that a capital defendant is allowed on the question whether he lives or dies; and makes that decision entirely arbitrarily.

B. *The Grant of Lawless Power in Capital Sentencing is Unconstitutional.*

We submit that the practice just described violates the rule of law basic to the Due Process Clause. The same submission was recently made to the Supreme Court of California, which rejected it by a vote of four Justices to three. *In re Anderson*, —— Cal.2d ——, 447 P.2d 117, 73 Cal. Rptr. 21 (1968). Justice Tobriner, joined by Chief Justice Traynor and Justice Peters, dissented in an opinion that states our position with incomparable lucidity. It was the view of the dissenters that the California statutes granting unfettered discretion to juries in capital sentencing

> "violate the Fourteenth Amendment of the Constitution of the United States because they provide no

[50] See pp. 13-20 *supra*.

[51] Cf. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960).

[52] Cf. *Baxstrom* v. *Herrold*, 383 U.S. 107 (1966).

> standards or tests whatsoever to enable judge or jury to decide why one convicted capital defendant should die and another should live. The California penalty trial leaves this vital decision to the unguided whim and caprice of the trier of fact; this irrational process, the antithesis of due process, has no place in the constitutional structure of American law." (Tobriner, J., joined by Traynor, C.J., and Peters, J., concurring and dissenting in *In re Anderson, supra*, 73 Cal. Rptr. at 36.)[23]

We commend the reasoning of the *Anderson* dissenting opinion to this Court. After examining the nature of the power which standardless capital-sentencing legislation confers upon the jury and concluding that it requires the jury *"to perform a sui generis function which subjects the convicted capital defendant to a power of arbitrary decision"* (*Anderson Dissent*, p. 40 (original emphasis)), the opinion states *the constitutional premise* against which such a power must be judged:

> "The constitutional imperative that laws infringing upon life and liberty be framed in terms of reasonably ascertainable standards is central to our administration of criminal justice." (*Anderson Dissent*, p. 42.)

Surely, this proposition is beyond dispute. For whatever else "due process of law" may encompass, it has always been thought to impose some demand of fundamental procedural regularity in decision making, some insistence upon the rule of law, some adherence to the principle established by Magna Carta that the life and liberty of the subject

[23] The dissenting opinion is at 73 Cal. Rptr. 36-59. We shall hereafter cite it as *Anderson Dissent*, p. , referring to the pages in 73 Cal. Rptr.

should not be taken but by the law of the land. This Court has long condemned the sort of vagueness in criminal statutes that "licenses the jury to create its own standard in each case." *Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937). See, e.g., *Smith* v. *Cahoon*, 283 U.S. 553 (1931); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445 (1927); *Winters* v. *New York*, 333 U.S. 507 (1948). Statutes which authorize *ad hoc* adjudications unconstrained by legal principles of general application thereby confer a "naked and arbitrary power" (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 366 (1886)), which is at war with Due Process. The vice of such statutes is not alone their failure to give fair warning of prohibited conduct, but the breadth of room they leave for jury arbitrariness and the influence of impermissible considerations. *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 432-433 (1963); *Freedman* v. *Maryland*, 380 U.S. 51, 56 (1965); Lewis, *The Sit-In Cases: Great Expectations*, 1963 Supreme Court Review 101, 119; Note, 109 U. Pa. L. Rev. 67, 80 (1960), including racial considerations, see *Louisiana* v. *United States*, 380 U.S. 145 (1965); *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965); *Cox* v. *Louisiana*, 379 U.S. 536 (1965), and every other insidious urging of caprice or prejudice.

The *Jackson* dissent points out that this basic principle of legality, of the rule of law, is no less applicable to a court's sentencing function than to its guilt-determining function. It notes this Court's recent explicit recognition in *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968), that while sentencing choice, and, in particular, the choice of life or death, may be

> "different in kind from a finding that the defendant committed a specified criminal offense, . . . this does not mean that basic requirements of procedural fair[illegible] . . . [illegible] . . . the determinations involved in this case differ in some respects from the

traditional assessment of whether the defendant engaged in a proscribed course of conduct."

Witherspoon, say the Anderson dissenters:

"therefore squarely stands for the proposition that the requirements of the Fourteenth Amendment—those that go to the very fairness and integrity of the penalty-determining process—apply to the procedure pursuant to which the state, be it by judge or jury, takes the life of a capital offender." (*Anderson Dissent*, p. 40.)

And other recent decisions of the Court point ineluctably to the same conclusion: See cases cited at p. 27 *supra*.

The question, then, is whether an unlimited grant of arbitrary power to make the life or death sentencing choice falls afoul of the Fourteenth Amendment's requirements that "go to the very fairness and integrity of the penalty-determining process." The *Anderson* dissenters conclude, and we here submit, that it does, for several reasons.

First, the totally undefined issue that is presented for the jury's decision makes it impossible for the defendant, whose life is at stake, advisedly and intelligently to prepare and present his defense on the sentencing question. We shall see in Part II of this brief, pp. 66-78 *infra*, that the single verdict trial procedure in capital cases immeasurably exacerbates the unfair litigation posture in which the defendant is put, by requiring him to fashion his case in a manner that sets at loggerheads his interests in a fair trial of the guilt question and a sound penalty determination. But, even without this additional handicap, the capital defendant who confronts a jury armed with unconfined and unguided power to sentence him to life or death is denied the least semblance of a fair trial on the matter of penalty. This Court has long recognized the

"principle of procedural due process . . . that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole* v. *Arkansas*, 333 U.S. 196, 201 (1948). *See In re Gault*, 387 U.S. 1, 33-34 (1967). Even in non-criminal matters, the Court has found a Due Process right to adequate notice of the issues posed for adjudication in a proceeding affecting individual interests. E.g., *Holden* v. *Hardy*, 169 U.S. 366, 389 (1898); *Morgan* v. *United States*, 304 U.S. 1 (1938); *Gonzales* v. *United States*, 348 U.S. 407 (1955). *A fortiori*, such notice and an "opportunity to be heard" are required in the sentencing phase of a criminal case, *Specht* v. *Patterson*, 386 U.S. 605, 610 (1967), particularly where the jury is "empowered . . . to answer 'yes' or 'no' to the question whether this defendant [is] . . . fit to live," *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968). But without rules of decision "sufficiently definite to guide the lawyer in contesting their applicability to his client . . . , the right to a hearing would be of little value, because there would be no adequate standards toward which argument and evidence could be directed." Note, 62 HARV. L. REV. 77, 78 (1948).[10]

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[10] The *Anderson Dissent*, p. 44, n. 9 quotes the following passage from this Harvard Note, which identifies the two due process concerns that are at the core of the present case:

> "'[D]ue process requires the adjudication of an individual's rights and duties to be governed by rules of sufficient objectivity to guard against an arbitrary or *ad hominem* result. It follows that such rules, when embodied in a statute, must be definite enough to enable the judge to make rulings of law and charges to the jury which are so closely referable to the statute as to assure consistency of application.
>
> "'Due process requires, in addition, that the rules be sufficiently definite to guide the lawyer in contesting their applicability to his client. Without this latter requirement, the right to a hearing would be of little value, because there would

It would be fair to describe the defendant's situation in a capital trial as a deadly guessing game. He cannot know what facts or positions will save him or cost him his life.[55] The legislature has not told him, or told the jury, when capital punishment is to be imposed or why it is to be imposed; and the jurors are free to take their own views. Views on capital punishment being what they are in our society, and the justifications for the death penalty being rather obscure matters of personal taste in the absence of some legislative specification, the jurors' attitudes will range wildly. A defense of consent which may not convince the jury to acquit the defendant may nevertheless lead it to the conclusion that—because the prosecutrix was less than firm in her resistance—the defendant should not be executed. Or the jury may think the degree of resistance by the prosecutrix irrelevant. Particularly where the defendant is Negro and the prosecutrix white, the defense of consent may cause the jury to execute the defendant for the unpardonable offense of adding slander to rape. Given its grisly risks, how is counsel to know what he stands to gain by making the defense?

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be no adequate standards toward which arguments and evidence could be directed. Both of these requirements would seem to be satisfied by the same degree of definiteness: a statute which is sufficiently definite to guide the judge should also be sufficiently definite to guide the lawyer in litigation, because there the function of each is the same—to test application of rules to particular situations." (Note, Due Process Requirements of Definiteness in Statutes (1948) 62 Harv. L. Rev. 77-78.)"

[55] "We must assume that in establishing the alternative punishments of death and life imprisonment rather than setting down one mandatory punishment, the Legislature concluded that not all capital offenders should be punished by the extreme penalty. . . . Yet the current administration of the death penalty, by failing to provide criteria sufficiently ascertainable to guide courts and juries in making that distinction, prevents a convicted capital defendant from knowing how to show that he falls within the class of capital offenders for whom the law contemplates the lesser penalty of life imprisonment." *Anderson Dissent*, p. 44.

If the defendant was under the influence of alcohol or drugs, the jury may take the view that that is a mitigating incident—or an aggravating one. Five jurors may have sympathy for a defendant who displays a severe mental or emotional disorder not amounting to legal insanity; while seven, who would reserve the death penalty for just such perverted savages, vote to kill him for his disorder. See *People* v. *Hines*, quoted at pp. 40-41, *supra*. The result is not a litigation in any ordinary sense but a flailing contest or a gambling escapade in which the wages of a misplaced guess are death. This is simply not a Due Process trial. See *Anderson Dissent*, pp. 43-44.

Second, "the complete absence of standards in the administration of the death penalty deprives the convicted capital defendant of any way to protect himself against an arbitrary imposition of the death penalty. Since no limitations bound the exercise of the discretion of the trier of fact, the defendant can neither challenge the evidence introduced . . . on the ground of insufficiency nor seek review on the ground of erroneous application of the death penalty to him." *Anderson Dissent*, p. 44. Standardless death sentencing thus effectively strips the convicted capital defendant of all of the safeguards of the Constitution in connection with the life-or-death penalty decision. Jurors may inflict death upon him for reasons or by processes forbidden by the clearest constitutional commands, and yet get away with it. The inability of the district and circuit courts below to come to grips with petitioner Maxwell's contention of racial discrimination is a striking example of how constitutional protections founder in the sea of limitless discretion that envelops and conceals the jury's decision-making process. The district court avoided Maxwell's compelling statistical showing of racially discriminatory sentencing patterns on the part of Arkansas juries by assuming that the factors which might be affecting the juror-

in their selection of the men sentenced to die were so subtle and complex that statistics could not take account of them all. (See A. 39-40.) Thus, although the court itself found as a fact that Negroes convicted of the rape of white victims were disproportionately frequently given death sentences, and although it was uncontested that no non-racial factor of which analysis was possible on the basis of an exhaustive empirical study could explain the racial death-sentencing differential, the court was able to imagine factors that must have escaped identification or measurement and that could account for the differential.[*] Perhaps. Such is the range of freedom in the jurors' sentencing decision that almost any speculation is possible.

The court of appeals took a somewhat more hard-headed view of the evidence and did not really deny that petitioner had proved a state-wide practice of racial discrimination. It rejected his Equal Protection contention principally on the ground that the particular jury which sentenced Maxwell to die had not been shown to have a discriminatory motivation. (A. 59-64.) Doubtless this last conclusion is factually correct. Since, under Arkansas law, Maxwell's jurors could have had almost anything in mind—or nothing in mind—to support their death verdict, it is quite impossible to say.

It has been pointed out that one of the purposes of the Due Process requirement of definiteness in penal legislation is to delimit "to what extent the administration of public order can assume a form which, first, makes possible the deprivation sub silentio of the rights of particular citizens, and, second, makes virtually ineffectious the federal judicial machinery established for the vindication of those rights." Note, 109 U. Pa. L. Rev. 69, 81 (1960). The

[*] Viz., the "issue of consent" discussed at A. 40.

function of courts to protect against the deprivation of specific constitutional guarantees—such as the guarantee against racial discrimination—"requires at the least a continued surveillance to assure the regularity of legislated and administered modes of applying public compulsion to all particular men. It requires, as a corollary, the maintenance of a state of institutions in which that surveillance is kept effective." *Id.*, at 89. If ever a form of penal enactment flouted these requirements, and thereby established a regime of administration in which nothing was certain but that denials of federal rights would go undetected and uncorrectible, standardless death sentencing legislation is that form.

Third, the arbitrary power which this legislation confers to differentiate among convicted rape defendants by sentencing some to life and some to death for any or no reason violates a constitutional concern in regard to which "the equal protection and due process clauses of the Fourteenth Amendment overlap." *Anderson Dissent*, p. 47. This is the concern for even-handed treatment which allows "no invidious discriminations between persons and different groups of persons," *Griffin* v. *Illinois*, 351 U.S. 12, 17 (1956), and ordains that all shall "stand on an equality before the bar of justice in every American court." *Ibid.*, quoting *Chambers* v. *Florida*, 309 U.S. 227, 241 (1940). A corollary of these propositions is that differences in the treatment of individuals by the courts must have some rational basis; that is, there cannot be differentiations without differences, nor differentiations along lines of difference that have no rational relation to the purpose for differentiating. E.g., *Rinaldi* v. *Yeager*, 384 U.S. 305 (1966); *Barstrom* v. *Herrold*, 383 U.S. 107 (1966). Particularly where "legislation . . . involves one of the basic civil rights of man . . . , strict scrutiny of the classification which a State makes . . . is essential, lest unwittingly or otherwise,

invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942).

The *Skinner* case held that a state could not, by legislative classification, draw the line of sexual sterilization between thieves and embezzlers. "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made . . . [a constitutionally forbidden invidious discrimination]." *Id.*, at 541. We take it that, under *Skinner*, a state could not constitutionally draw the line of death between thieves and embezzlers either; nor could it permit its juries to draw so irrational a line in the exercise of a general death-sentencing discretion. If this is so, it is difficult to conceive how Arkansas may give its juries *arbitrary* power—which necessarily includes the competence to draw lines as unsubstantial as the line between thieves and embezzlers, or more unsubstantial still—without falling afoul of the same constitutional interdiction.

This is not to say, of course, that a state may not constitutionally provide for differential sentencing of offenders convicted of the identical offense. There is no inconsistency whatever between the principle of equality and a procedure for individualizing sentencing, even death sentencing. "Equality and individualization go together; they complement each other. They are of one piece."[17] This is so because any system of individualization that efficiently serves the penal interests of the state must necessarily be based upon some rational scheme for differentiating among offenders; and if the bases of differentiation are rational,

[17] Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 69 (1966).

the Fourteenth Amendment is satisfied. The trouble with standardless death-sentencing legislation is that it authorizes *irrational* differentiation.[55] By

> "providing no classificatory criteria whatsoever, [it] permits the trier of fact *arbitrarily* to determine whether [a] particular convicted capital defendant should suffer death rather than life imprisonment. Such absence of classification renders the current procedure insufficient to satisfy even the *minimum* requirement of the equal protection clause that differential treatment of persons prima facie similarly situated must bear some rational relation to a discernible legislative purpose. In failing to provide any rational basis upon which to justify an imposition of the death penalty on those particular capital defendants sentenced to death rather than life imprisonment, [standardless death-sentencing statutes make an invidious discrimination]. . . . 'It is clearly unconstitutional to enable a public official [by alone an ad hoc group of 12 individuals][56] to * * * engage in invidious discrimination among persons or groups * * * by use of a statute providing a system of broad discretionary * * * power.' (Cox v. State of Louisiana, . . . 379 U.S. 536, 557

[55] "Recognition of the problem created by disparate sentences does not, however, compel the conclusion that all offenders who commit the same offense ought to receive the same sentence—the theory of 'uniform sentencing.' There may be differentiating personal and social factors which require 'individualization' of different sentences for offenders who have engaged in the same anti-social conduct. But if a system of individualization is to satisfy objections against disparity, the disparity inherent in individualization must result from the articulated application of uniform criteria designed to effectuate agreed-upon goals." Note, 69 YALE L.J. 1453, 1459 (1960).

[56] This bracketed insertion is by the author of the *Anderson* dissent. The others in the passage are ours. Emphasis throughout is found in the original.

[1965] . . . ; Yick Wo v. Hopkins, . . . 118 U.S. 356, 366-368 [1886] . . . .) Thus, the trier of fact's absolute power to impose the death penalty on a convicted capital defendant violates the basic interdictment of the equal protection clause that no person shall hold 'a naked and arbitrary power' to make invidious discriminations against another. (Yick Wo v. Hopkins, supra, 118 U.S. at pp. 366, 368, . . .)" (*Anderson Dissent*, pp. 49-50.)

Fourth, and most fundamentally, the process of the standardless death sentencing decision subjects the defendant to an exercise of legally unregulated power which is antithetical to the rule of law expressed by Due Process.

"The epitome of the vice of absence of procedural safeguards inherent in vague and standardless statutes thus permeates the administration of the death penalty: the defendant sentenced to death cannot even show that an ad hoc group of 12 jurors . . . exercising absolute power over his life abused this discretion. [The statutes giving the jury such power] . . . thus deny due process of law because they provide no standards by which an abuse of discretion by the trier of fact can be curbed or even subjected to review. The power of the trier of fact to decree the death sentence is as broad and arbitrary as it is absolute and untouchable." (*Anderson Dissent*, p. 44.)

In this aspect, what is constitutionally wrong with standardless death sentencing is that it collides violently with a principle so basic that it hardly ever is or needs to be explicitly asserted, because our entire system of law assumes it. It is the principle of legality. Standardless death sentencing is its opposite: arbitrariness. In order to protect against the regime of arbitrariness, the fabric of

our legal structure—laws, Constitution, and courts—has been established. The function of the structure, to maintain the rule of law, has as its one most essential objective to deny arbitrariness entrance to the system. For "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886).

Under the principle of legality, it could scarcely be contended that an Arkansas statute would be valid which provided: "Whoever is found condemnable in the discretion of the jury shall be guilty of an offense."[60] Yet we submit

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[60] See PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968) 92-94:

> "Let us suppose for a moment that a legislature, contemplating the momentous problem of drafting a new criminal code, decided to solve its problem by a single grand enactment: whoever does anything bad shall be punished as justice may require. When a court is called upon to decide whether John Jones, who hit his neighbor over the head with a hammer during the course of an argument, has violated the statute, is the court making law or is it applying law? The question is absurd, of course. In a sense, the court is doing both. But the significant question, which is concealed by categorical treatment of law-making and law-application, is: how great a degree of freedom is the court allocated in deciding whether to treat John Jones's conduct as criminal? The extremity of the example makes the issue clear. . . . It hardly needs argument that the hypothetical criminal enactment just proposed —whoever does anything bad shall be punished as justice may require—does violence to the principle of legality. As the example shows, it is not enough that the law formally being applied is law in existence at the time the conduct complained of occurred. Devices are needed to ensure that the amount of discretion entrusted to those who enforce the law does not exceed tolerable limits. But the working out of the devices and the decision about what limits are tolerable are functions that fall to the courts. It is, of course, no accident that they fall to the courts; neither, however, is it the result of any

so, one must begin by recognizing what this Court has several times said, that much evidence which is not relevant to the issue of guilt of the charge for which the capital accused is on trial—evidence which, indeed, is prejudicial and inadmissible on the issue of guilt—is highly relevant to a non-arbitrary decision on the question of punishment. "[M]odern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial." *Williams* v. *New York*, 337 U.S. 241, 247 (1949); see also *Williams* v. *Oklahoma*, 358 U.S. 576, 585 (1959); *Witherspoon* v. *Illinois*, 391 U.S. 510, 521 n. 20 (1968). *A fortiori*, a jury engaged in the task of determining whether a defendant shall live or die needs much information that cannot and should not be put before it within the confines of traditional and proper limitations on the proof allowable as going to guilt or innocence. It is fair to say that the overwhelming weight of considered contemporary judgment concurs in the conclusion that, whether discretionary death sentencing be done by a judge or jury, it is the imperative condition of rational sentencing choice that the sentencer consider more information about the individual defendant than is likely or permissibly forthcoming on trial of the guilt issue. E.g., HOUSE OF COMMONS SELECT COMMITTEE ON CAPITAL PUNISHMENT, REPORT (H.M.S.O. 1930), para. 177; ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, REPORT (H.M.S.O. 1953) (Cmd. No. 8932), 6, 12-13, 195, 201, 207; AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft. No. 9 (May 8, 1959), Comment to §201.6 at 74-76; NEW YORK STATE TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE, INTERIM REPORT (Leg. Doc. 1963, No. 8) (February 1, 1963), 15-16; H.L.A. Hart, *Murder and the Principles of Punishment:*

England and the United States, 52 Nw. U.L.Rev. 433, 438-439 (1957); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U.Pa. L.Rev. 1099, 1109, 1135-1136 (1953); Handler, *Background Evidence in Murder Cases*, 51 J. Crim.L., Crim. & Pol. Sci. 317, 321-327 (1960).

The single-verdict procedure therefore confronted petitioner, on trial for his life, with a gruesome Hobson's choice:

> Petitioner had a crucial interest—amounting, indeed, to an independent federal constitutional right, see *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942)—that his sentence be rationally determined. The Constitution guaranteed him, also, certain procedural rights in this sentencing process: *inter alia*, "an opportunity to be heard . . . and to offer evidence of his own." *Specht* v. *Patterson*, 386 U.S. 605, 610 (1967); *Mempa* v. *Rhay*, 389 U.S. 128 (1967). As the basis for a rational sentencing determination, he would want to present to the sentencing jurors evidence of his history, his character, his motivation, and the events leading up to his commission of the crime of which he was guilty (if he was guilty). The common-law gave him a right of allocution which is an effective vehicle for this purpose, as well as for a personal appeal to the jurors, where capital sentencing is discretionary. This Court has already recognized that allocution may in some circumstances rise to the dignity of a due process command.[75]

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[75] *Hill* v. *United States*, 368 U.S. 424, 428-429 (1962); see *Andrews* v. *United States*, 373 U.S. 334, 336-337 (1963). Acting on these opinions, several circuit courts have found allocution a constitutional right. *Green* v. *United States*, 313 F.2d 6 (1st Cir. 1963), *cert. denied* 372 U.S. 951 (1963); *United States* v. *Johnson*, 315 F.2d 714 (2d Cir. 1963), *cert. denied*, 375 U.S. 971 (1964); *Behrens* v. *United States*, 312 F.2d 223 (7th Cir. 1962), *aff'd*, 375 U.S. 162 (1963).

The *Hill* case holds that, absent "aggravating" circumstances (368 U.S. at 429), failure of a sentencing judge to invite the

But to exercise his right of allocution before verdict on the guilt issue, petitioner was required to forego his constitutional privilege against self-incrimination. *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Griffin* v. *California*, 380 U.S. 609 (1965). He was required to take the stand and be subjected to cross-examination that could incriminate him.[76]

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defendant to exercise his right of allocution does not violate due process. But *Hill* was not a capital case, nor a case in which counsel was denied the right to present pertinent information to the sentencer, nor "a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed . . . . [nor where the sentencer] was either misinformed or uninformed as to any relevant circumstances . . . [nor where it was even claimed] that the defendant would have had anything at all to say if he had been formally invited to speak." *Ibid.* In an Arkansas capital case, the following "aggravating circumstances" are presented: (A) the circumstances that the right of allocution has had unique historical significance in capital cases, see *Couch* v. *United States*, 235 F.2d 519, 521 (D.C. Cir. 1956) (opinion of Judge Fahy); *Coleman* v. *United States*, 334 F.2d 558, 566 (D.C. Cir. 1964) (opinion of Judges Burger and McGowan); (B) the circumstance that in capital cases matters which may affect the sensitive discretion of the jury in its life-death choice are traditionally viewed with a stricter eye to possibilities of prejudice than are other matters in the criminal process, see *People* v. *Hines*, 61 Cal. 2d 164, 390 P.2d 398, 37 Cal. Rptr. 622 (1964); (C) the circumstance that Arkansas' single verdict procedure "affirmatively" denies a defendant his opportunity to address the jury on sentence, within the meaning of *Hill, supra;* (D) the circumstance that, for the reasons set out above in text, a jury making a capital sentencing choice on no other information than the trial of the guilt issue allows is invariably "either misinformed or uninformed" within the meaning of *Hill;* (E) the circumstance that, under the Arkansas procedure, not only is the defendant denied the right to make a personal statement without giving up his constitutional privilege against self-incrimination, but he is similarly denied the right to have his counsel supply evidence on the sentencing issue without incurring the risks of prejudice on the guilt issue, see the *Johnson* and *Behrens* cases cited, *supra;* also *Gadsden* v. *United States*, 223 F.2d 627 (D.C. Cir. 1955); *Jenkins* v. *United States*, 249 F.2d 105 (D.C. Cir. 1957).

[76] Even apart from cross-examination, allocution before verdict of guilt destroys the privilege, for much of the value of the defendant's personal statement to his sentencer derives from its spon-

He declined to surrender the Privilege, and did not address the jury. (A. 41.) The jurors who sentenced him to die therefore had neither heard his case for mercy, nor even the sound of his voice.

United States v. *Jackson*, 390 U.S. 570 (1968), holds that the exercise of the Fifth Amendment privilege in criminal trials may not be penalized or needlessly burdened. Simultaneous submission to the jury of the guilt and death penalty issues results in just such a needless burden. The burden is the obvious and onerous one that the defendant must go to his death like a dumb animal, forbidden to plead his case and incapable even of impressing the human quality of his voice on his sentencing jury. It is a needless burden because the State has ample means to avoid it by, for example, a bifurcated jury trial, judge sentencing, or the elimination of the death penalty. Consistently with *Jackson*, *Simmons* v. *United States*, 390 U.S. 377, 394 (1968), points the way to condemnation of the "undeniable tension" between constitutional rights presented here. The question in *Simmons* was whether a defendant might be obliged either to give up what he believed to be a valid Fourth Amendment claim or "in legal effect, to waive his Fifth Amendment privilege against self-incrimination"; and this Court there held it "intolerable that one constitutional right should have to be surrendered in order to assert another." *Ibid.*

But the single-verdict practice which petitioner challenges presents grave problems in addition to this conflict between the right of allocution and the privilege. If the defendant

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taneity, see *Green* v. *United States*, 365 U.S. 301, 304 (1961) (opinion of Mr. Justice Frankfurter). This same spontaneity—unguided by the questions of counsel—leaves the defendant impermissibly unprotected as he appears before a jury which has not yet decided on his guilt. *Cf. Ferguson* v. *Georgia*, 365 U.S. 570 (1961).

seeks to present to the jury evidence of his background and character, apart from his own statement, the prosecution may counter with evidence of the defendant's bad character, including evidence of unrelated crimes. The prohibition which ordinarily keeps this sort of evidence from the trial jury sitting to determine the issue of guilt is "one of the most fundamental notions known to our law," *United States* v. *Beno*, 324 F.2d 582, (2d Cir. 1963), arising "out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence," *Lovely* v. *United States*, 169 F.2d 386, 389 (4th Cir. 1948); see *Marshall* v. *United States*, 360 U.S. 310 (1959). Allowing the trial jury access to unfavorable background information, however pertinent to the issue of punishment, and however clearly limited by jury instructions to that use, may itself amount to a denial of due process of law. Compare *United States ex rel. Scoleri* v. *Banmiller*, 310 F.2d 720 (3d Cir. 1962), *cert. denied*, 374 U.S. 828 (1963), with *United States ex rel. Rucker* v. *Myers*, 311 F.2d 311 (3d Cir. 1962), *cert. denied*, 374 U.S. 844 (1963). In any event, the possibility that the background information will be strongly prejudicial forces a defendant to a "choice between a method which threatens the fairness of the trail of guilt or innocence and one which detracts from the rationality of the determination of the sentence." AMERICAN LAW INSTITUTE, MODEL PENAL CODE, *supra* at 64.

In this aspect, the practice of simultaneous submission of guilt and sentence to a jury is much akin to New York's former practice of simultaneously submitting to a jury the two issues of the voluntary nature of a confession and the guilt of the accused. The New York practice was, of course, struck down in *Jackson* v. *Denno*, 378 U.S. 368 (1964), where the Court recognized that joint jury trial of the two issues prevented either from being "fairly and reliably

determined." 378 U.S. at 389; see *id.* at 386-391. One fault of the practice was that:

> ". . . an accused may well be deterred from testifying on the voluntariness issue when the jury is present because of his vulnerability to impeachment by proof of prior convictions and broad cross-examination. . . . Where this occurs the determination of voluntariness is made upon less than all of the relevant evidence. (378 U.S. at 389 n. 16).[77]

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[77] To the extent that petitioner's argument on this branch of his case draws sustenance from the radiations of the rule of *Jackson* v. *Denno*, text, *supra*, his argument is not weakened by *Spencer* v. *Texas*, 385 U.S. 554 (1967), cited by the court of appeals. The *Spencer* decision dealt with the Texas procedure for determining the punishment decreed under its recidivist statutes, pursuant to which a jury trying a criminal defendant was informed by a reading of the indictment that the defendant had been convicted of prior crimes, and evidence was introduced in support of these allegations during the course of trial. The procedure was attacked on the ground that it unduly prejudiced the defendant on the issue of guilt, in violation of the Due Process Clause. In rejecting this attack, the Court held, *inter alia*, that *Jackson* v. *Denno* did not require a two-stage jury trial for invocation of a state's habitual offender statute and that "the emphasis [in *Jackson*] was on protection of a specific constitutional right and the *Jackson* procedure was designed as a specific remedy to ensure that an involuntary confession was not in fact relied upon by the jury," 385 U.S., at 565.

But no more "specific constitutional right" can be imagined than that which prohibits the state's taking of petitioner's life pursuant to a sentencing process which is irrational because sentencing choice is made without information essential to the choice, *Skinner* v. *Oklahoma, supra; Specht* v. *Patterson, supra.* And though the Court in *Spencer* read *Jackson* as not broadly requiring a two-stage jury proceeding whenever evidence of prior crimes which might possibly prejudice the jury's determination of the guilt issue is presented at the trial (because of the justifications generally accepted for permitting such evidence—see 385 U.S., at 560-61), Jackson's holding that "a general jury verdict [is] not a reliable vehicle for determining the issue of voluntariness [of a confession] because jurors might have difficulty in separating the issue of voluntariness from that of guilt or innocence," 385 U.S. at 565, is unimpaired. See *Burgett* v. *Texas*, 389 U.S. 109 (1967):

And see *Bruton* v. *United States*, 391 U.S. 123 (1968).

It is in precisely the same manner that single-verdict capital sentencing tends either to make trials of guilt unfair—by forcing the defense to present evidence potentially helpful on the punishment issue and prejudicial on the issue of guilt—or to produce the unfair result that men are sentenced to death "upon less than all of the relevant evidence" if the defense declines to take that risk.[78]

Simmons v. *United States*, text, *supra*. That, by analogy, applies with equal, if not greater force to the jury's determination of the issues of guilt and sentence in a capital case. The "specific remedy" for reliably determining these issues enjoined on the courts by *Jackson*, reinforced by *Sims* v. *Georgia*, 385 U.S. 538 (1967), and endorsed by *Spencer* is that of separate consideration of the issues.

Moreover, there are crucial differences between the situation presented here and that presented by the practice challenged in *Spencer*. First, the sole claim urged by the petitioners in *Spencer* was that the introduction of prior crime evidence before jury verdict on the guilt issue unduly prejudiced the defendant on that issue (385 U.S. at 559, 567) and was therefore unconstitutional per se. Petitioner's submission here differs. The effect of the single-verdict sentencing procedure which he challenges is to confront a capital defendant with the grim specter of having to sacrifice one or another of his precious constitutional rights, either allocution or self-incrimination. By whatever choice he makes, he is prejudiced on either the issue of guilt or sentence; and he must decide—with his life at stake—which kind of prejudice to invite. Cf. *Whitus* v. *Balkcom*, note 78, *infra*. Also, while in *Spencer* the juries were given limiting instructions to guide their consideration of the prior crime evidence on the guilt issue, the jury's discretion in sentencing choice under Arkansas law is not limited or regulated in any way. See pp. 24-45, *supra*. Hence there is more than "the possibility of some collateral prejudice" (385 U.S. at 564) which the Court in *Spencer* thought not of sufficient gravity to condemn the procedure there attacked.

Finally, the Arkansas procedure has been shown on this record to have resulted in a pattern of racially discriminatory death sentencing. This goes far toward satisfying the concern of the *Spencer* court over the lack of a convincing showing of prejudice.

[78] Such a " 'grisly,' hard, Hobson's choice" is itself so unfair as to violate due process. See *Whitus* v. *Balkcom*, 333 F.2d 496, 499 (5th Cir. 1964).

This latter alternative was the course of Maxwell's trial, and its result. Not only, in such a case, is the jury empowered to act arbitrarily, see pp. 24-65, *supra;* it is virtually compelled to do so for want of information upon which nonarbitrary choice can be based. In short, although the Due Process Clause guaranteed Maxwell a fair trial on the issue of punishment, *e.g., Townsend* v. *Burke,* 334 U.S. 736 (1948), as well as on the issue of guilt, *e.g., Irvin* v. *Dowd,* 366 U.S. 717 (1961), the single-verdict procedure employed in his case required him to purchase the second of these at the cost of the first. Cf. *Fay* v. *Noia,* 372 U.S. 391, 440 (1963).

As the question in *United States* v. *Jackson,* 390 U.S. 570 (1968), was whether the provision of the federal kidnaping statute reserving the infliction of the death sentence to the exclusive province of the jury "needlessly encourages" guilty pleas and jury waivers and therefore "needlessly chill[s] the exercise of basic constitutional rights," 390 U.S., at 582, 583, so the question here is whether the simultaneous trial of guilt and punishment *needlessly encourages* the waiver of the right to remain silent or *needlessly chills* the right to put in evidence relevant to rational sentencing and the right of allocution. "The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive." 390 U.S., at 582. We submit the answer to the question is clear, in light of the ready availability of alternative modes of procedure not involving the same destructive collision of the defendant's rights—such as the split-verdict procedure now in use in a number of jurisdictions[79] and uni-

[79] A man tried on a capital charge in California, Connecticut, New York, Pennsylvania and Texas receives first a hearing on innocence or guilt; then, after a finding of guilt, a separate hearing

formly recommended by modern commentators, see *Frady* v. *United States*, 348 F.2d 84, 91 n. 1 (D.C. Cir. 1965) (McGowan, J.); cf. *United States* v. *Curry*, 358 F.2d 904, 914 (2d Cir. 1965).[80]

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on the issue of punishment. CAL. PENAL CODE, §190.1 (Supp. 1966); CONN. GEN. STAT. REV. §53-10 (Supp. 1965); N.Y. PEN. LAW §§125.30, 125.35 (Cum. Supp. 1968); PA. STAT. ANN., tit. 18, §4701 (1963); TEX. CODE CRIM. PRO., Art. 37.07 (1967). See also §210.6 of the Model Penal Code, note 66, *supra*. In view of the availability of this alternative "split-verdict" mode of procedure which does not entail the deprivation of petitioner's rights, the constitutionally unfair single-verdict procedure used in petitioner's case can obviously not be defended on the ground of necessity. Petitioner, of course, does not contend that the State is constitutionally compelled to have a bifurcated trial. The bifurcated trial is only one of the alternatives available to the State which do not entail the needless burden on capital defendants' constitutional rights here complained of.

[80] Cf. *Witherspoon* v. *Illinois*, 391 U.S. 510, 520 n. 18 (1968), noting that if a defendant could establish that a jury which was representative with respect to penalty was *not* representative with respect to guilt,

> "the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment."

CONCLUSION

Petitioner's trial jury was permitted lawless and arbitrary power to decide whether he should live or die, in violation of the rule of law that is fundamental to the Fourteenth Amendment. Arkansas' single-verdict capital trial procedure assured that this arbitrary power would be used arbitrarily, by depriving the jury of information requisite to rational sentencing choice, as a consequence of petitioner's exercise of his Fifth and Fourteenth Amendment privilege against self-incrimination. The use of these two procedures at his trial deprived petitioner of his life without due process of law. The judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Evidence and Findings Below Relating to Racial Discrimination by Arkansas Juries in the Exercise of Their Discretion to Sentence Capitally for the Crime of Rape.

A. *The Evidence of the Wolfgang Study.*

Petitioner's second federal habeas corpus petition, giving rise to the proceedings now before the Court, alleged that new evidence had become available with respect to his claim of racial discrimination in capital sentencing, previously urged at his trial, on his direct appeal, and in his initial federal habeas application. It averred, specifically, that a systematic study of Arkansas rape convictions during a twenty-year period had been:

> "conducted in the summer of 1965, as part of a study of the application of the death penalty for rape in eleven southern states. This comprehensive study required the work of 28 law students throughout the summer, the expenditure of more than $35,000 and numerous hours of consultative time by expert criminal lawyers, criminologists and statisticians. Petitioner, who is an indigent, could not have himself at any time during the prior proceedings in his cause conducted such a study." (A. 6, quoted by the court of appeals, at A. 48.)

At a pre-trial conference, the district court was advised that petitioner intended to present at an evidentiary hearing the results of this comprehensive study. Its pre-trial conference order reflected that petitioner's evidence would consist in part of "the testimony of Dr. Marvin E. Wolfgang, a criminologist and statistician on the faculty of the University of Pennsylvania, and . . . certain studies and

a report made by Professor Wolfgang," which in turn were based upon "[b]asic data . . . gathered by law student field workers from various sources and . . . recorded on individual case schedules." (A. 17-18.) Accordingly, the order provided for procedures to facilitate the establishment of "the validity and accuracy of the individual case schedules." (A. 18.)[1a]

> "It was agreed that counsel for Maxwell will make those schedules available for the inspection of counsel for Respondent not later than August 10 and will also furnish the names and addresses of the field workers who assembled the original data in Arkansas. Not later than August 15 counsel for Respondent will advise opposing counsel and the Court as to whether, to what extent, and on what grounds he questions any individual case schedule.
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> "Subject to objections on the ground of relevancy and materiality, and subject to challenges to individual case schedules, Professor Wolfgang will be permitted to testify as an expert witness and to introduce his

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[1a] The "individual case schedules" referred to are the completed forms, for each case of conviction of rape, of the printed schedule captioned "Capital Punishment Survey" admitted as Petitioner's Exhibit P-2 (Tr. 57). [Tr. — references in this Appendix are to the original transcript of the district court proceedings.] The use of this printed schedule in the process of data-gathering was explained by Dr. Wolfgang at Tr. 22-25. Instructions given the field researchers in use of the schedule are included in the record as an exhibit, Petitioner's Exhibit P-3 (Tr. 25-27, 57), but, in view of the respondent's concession that the facts gathered by the researchers were accurate, see text *infra*, no effort was made in the testimony to demonstrate the steps taken in gathering the data to assure reliability. See Tr. 25-27. Also, in light of the court's pre-trial conference order, text, immediately *infra*, the completed "individual case schedules" were not introduced in evidence.

report as a summary exhibit reflecting and illustrating his opinions. Again subject to objections or challenges to individual schedules there will be no occasion for Petitioner to introduce the schedules in evidence or prove the sources of the information reflected thereon or therein, or to call the individual field workers as witnesses." (A. 18.)

When the case came on for hearing, counsel for petitioner announced that no objections had been filed by the respondent to any of the individual case schedules, so that "all of the facts in the schedules are treated as though they are true, and Dr. Wolfgang's testimony is to be treated as though based not on schedules, but on facts which are established of record . . . As I understand it, the basic facts on which Dr. Wolfgang's testimony and his analysis are made are treated as established for the purpose of this case." (Tr. 8.) Counsel for respondent and the court agreed with this statement (Tr. 8-9), the court settling that:

> "The basic facts—that is, the age of the victim, the race, and so on, of the individual defendants, or the alleged victims—the basic evidentiary facts, as the Court understands it, stand admitted, and that Dr. Wolfgang in testifying, or anybody else who testifies about these basic figures, will not be faced with an objection as to the authenticity of his basic data." (Tr. 9.)[2a]

On this understanding, Dr. Marvin E. Wolfgang was called as a witness for petitioner. In its written opinion, the district court termed him a "well qualified sociologist

[2a] The Court of Appeals accepted this procedure without question. (A. 48.)

and criminologist on the faculty of the University of Pennsylvania" and noted that his "qualifications to testify as an expert are not questioned and are established" (257 F. Supp. at 717-718; A. 33).[3a] (Similarly, the Court of Appeals was later to find that Dr. Wolfgang "obviously is a man of scholastic achievement and of experience in his field," whose " 'qualifications as a criminologist have [concededly] never been questioned by the respondent.' " (398 F.2d at 141; A. 49.)) Dr. Wolfgang's testimony occupies some ninety pages of the transcript of the hearing (Tr. 10-99); in addition, "a written report prepared by him, together with certain other relevant documentary material, was received in evidence without objection" (257 F. Supp. at 717-718; A. 33-34). The written report referred to, Petitioner's Exhibit P-4, was received as substantive evidence (Tr. 57), and will be relied upon together with Dr. Wolfgang's testimony in the summary of evidence that follows.

The district court's opinion fairly summarizes the "background facts of the Wolfgang study":[4a]

> "In early 1965 Dr. Wolfgang was engaged by the NAACP Legal Defense and Educational Fund, Inc., to

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[3a] Interrogation of Dr. Wolfgang establishing his qualifications is at Tr. 10-14. In addition, Petitioner's Exhibit P-1, a *curriculum vitae* of Dr. Wolfgang, was received in evidence to establish his qualifications, Tr. 14-16. Dr. Wolfgang is one of the foremost criminologists in the country.

[4a] The general scope of the study, which gathered data concerning every case of conviction for rape during a 20-year period in 250 counties in eleven States, is described more fully in the affidavit of Norman C. Amaker, Esq., attached as Exhibit 2 to the petition for habeas corpus. For other descriptions, see the Memorandum and Order, dated July 18, 1966, appended to the opinion in *Moorer v. South Carolina*, 368 F.2d 458 (4th Cir. 1966); and the opinion in *Matter of Sims and Abrams*, 389 F.2d 148 (5th Cir. 1967).

make a study of rape convictions in a number of southern States, including Arkansas, to prove or disprove the thesis that in those States the death penalty for rape is disproportionately imposed upon Negro men convicted of raping white women. Dr. Wolfgang was apprised of the fact that the results of his study might well be used in litigation such as the instant case.

"As far as Arkansas is concerned, Dr. Wolfgang caused Mr. John Monroe, a qualified statistician, to select a representative sample of Arkansas counties with reference to which the study would be made. The sample drawn by Mr. Monroe, who testified at the hearing, consisted of 19 counties in the State.

"During the summer of 1965 law students interested in civil rights problems were sent into Arkansas to gather basic data with respect to all rape convictions in the sample counties for a period beginning January 1, 1945, and extending to the time of the investigation. Data obtained as to individual cases were recorded on individual case schedules. When the work was completed, the individual schedules were turned over to Dr. Wolfgang for evaluation.

"The investigation brought to light 55 rape convictions during the study period involving 34 Negro men and 21 white men. The offenses fell into three categories, namely: rapes of white women by Negro men; rapes of Negro women by Negro men; and rapes of white women by white men. No convictions of white men for raping Negro women were found." (257 F. Supp. at 718; A. 34-35. See also the opinion of the Court of Appeals, 398 F.2d at 141-142; A. 49.)

The design of the investigation was described by Dr. Wolfgang as a function of its objectives "to collect the

appropriate kind of data necessary to provide some kind of empirical study, either in support of, or in rejection of, the underlying assumption" (Tr. 17)—i.e., that there is racially differential imposition of the death penalty for rape in the States studied (Tr. 16-17)—and "to give the empirical data the appropriate kind of statistical analysis that would satisfy scientific requirements" (Tr. 17). The basic research methodology involved these several stages: (1) identification of the cases to be studied; (2) collection of data concerning the critical variables (race of defendant, race of victim, sentence imposed) in each case, and statistical analysis of the relationship between these variables; (3) collection of data concerning other variables ("control" variables) in each case, and statistical analysis of the relationship between each such variable and the critical variables (race and sentence) to determine whether the operation of the control variables could explain or account for whatever relationship might be observed between the critical variables; (4) reporting of results of the analysis. It is convenient to summarize the evidence presented to the district court under these four heads, with respect to the Arkansas study. Such a summary can only imperfectly portray the character and range of the Wolfgang study. We respectfully invite the Court's attention to the whole record of the hearing below.

1. Identification of the Cases to Be Studied.

Data were gathered concerning every case of conviction for rape during a 20-year period (January 1, 1945 to the summer of 1965) in a representative sample of Arkansas counties (Tr. 21). Two points should be noted here.

First, because the study begins with cases of *conviction for rape*, it addresses itself at the outset to the possibility

suggested by the Supreme Court of Arkansas on the direct appeal in petitioner's case, *Maxwell* v. *State*, 236 Ark. 694, 370 S.W.2d 113 (1963), that any showing that Negroes are more frequently sentenced to death for rape than whites might be accounted for by the supposition that Negroes commit rape, or are convicted of rape, more frequently than whites. What is compared in this study is the rate of capital sentencing of Negro and white defendants *all of whom* have been convicted of rape.

Second, in order to give a valid basis for generalization about the performance of Arkansas juries, *every* case of conviction for rape in a randomly selected sample of Arkansas counties was included in the study (Tr. 62-63). The county sampling procedure was employed because resources available for the field study did not permit the gathering of data in every county in the State (Tr. 21, 107-111), and because it is "unnecessary to collect every individual case, so long as the sample is presumed to be a valid representation—a valid representative one" (Tr. 21). At Dr. Wolfgang's request, a random sample (Tr. 128) of Arkansas' 75 counties was drawn by Mr. John Monroe, a "qualified statistician" (257 F. Supp. at 718; A. 34), with seventeen years experience in sampling and surveys (398 F.2d at 144; A. 53-54).[5a] Testifying below, Mr. Monroe described in detail the sampling process used (Tr. 107-141) to draw counties "in such a manner that the sample counties within each state would provide a representative sampling for that state so that inferences could be drawn for each state in the sample and for the region as a whole" (Tr. 107). Nineteen counties in the State (Tr. 28, 118; 122-123; Petitioner's Ex-

[5a] Mr. Monroe's qualifications appear at Tr. 104-106. His biography, in summary form, was admitted as Petitioner's Exhibit P-10 (Tr. 144-145).

hibit P-5, appendices C, D; Petitioner's Exhibit P-7) containing more than 47 per cent of the total population of Arkansas (Petitioner's Exhibit P-4, p. 1; Tr. 130; 398 F.2d at 144; A. 54) were drawn by a "theoretically unbiased" random method (Tr. 118). Mr. Monroe testified that "a sample is the procedure of drawing a part of a whole, and if this sample is drawn properly according to the law of chance, or with known probability, by examining a small part of this whole, and using the appropriate statistical methods, one can make valid inferences about the whole population from examining a small part" (Tr. 116). He concluded that his own sample of Arkansas counties "is a very reliable sample under the restrictions that we were confined to, the number of counties that could be investigated during the time allotted. In other words, for the size of the sample, the 19 counties, it was a very reliable and highly acceptable sample insofar as sampling statistics are concerned" (Tr. 118; see also Tr. 130, 132). "I would say that, as far as the sample is concerned, the inferences drawn from this sample, as described, are valid for the State of Arkansas" (Tr. 135). See 398 F.2d at 144; A. 54.

(These conclusions were not questioned by the courts below, although, as we shall see, both courts were concerned over the circumstances that Mr. Monroe's areal sampling methods resulted in the selection of counties that lie principally in the southern and eastern portions of the State. This circumstance was apparently not thought to impugn the sample's *factual* representativeness—to the contrary, as the record shows and the district court found (257 F. Supp. at 720; A. 38), the sampling method was "acceptable statistically"—but it was given importance by the *legal* theory of both courts that petitioner was required to show that Garland County, not the State of Arkansas as a

whole, applied the death penalty for rape discriminatorily. Notwithstanding this legal conception, neither court below contested the uncontradicted factual assertions of Mr. Monroe, as an expert statistician, that conclusions drawn from data gathered in his sample counties would be valid for the State of Arkansas. See 398 F.2d at 144; A. 53-55.)

2. Data Concerning the Critical Variables (Race and Sentence) and Statistical Analysis of the Relationship Between Them.

For each individual case of conviction of rape, data were gathered as to race of defendant, race of victim, and sentence imposed (Tr. 28-30).[6a] Using approved statistical techniques, analysis was performed to determine the relationship among these variables (Petitioner's Exhibit P-4, pp. 2-4). Briefly, the analysis involved these steps: (a) erection of a scientifically testable "null hypothesis" "asserting there is no difference in the distribution . . . of the sentence of death or life imprisonment imposed on Negro or white defendants" (Tr. 30-31; see also Tr. 31-32); (b) calculation of a "theoretical or expected frequency" (Tr. 33) which represents the number of Negro defendants and the number of white defendants (or, more specifically, the number of Negro defendants convicted of rape of white victims, and of all other defendants) who would be expected to be sentenced to death if the null hypothesis (that sentence is not related to race) were valid (Tr. 32-33); (c)

[6a] The sources from which these data, and other data relating to the individual cases of rape convictions studied, were obtained is described in detail in Petitioner's Exhibit P-3, pp. 1-6. See note 8a, *infra*. Because the accuracy of all the basic data was conceded by the respondent below, see text *supra* at pp. 1a-3a, methods of data collection and data sources were not developed at the hearing, and Exhibit P-3 was put in merely for the information of the court.

comparison of this "theoretical or expected frequency" with the frequency of death sentences actually observed in the collected data for each racial combination of defendants and victims; and (d) determination whether the discrepancy between the expected and observed frequencies is sufficiently great that, under generally accepted statistical standards, that discrepancy can be said to be a product of the real phenomena tested, rather than of the operation of chance within the testing process, sampling, etc. (Tr. 33-37). "If that difference reaches a sufficiently high proportion, sufficiently high number, then the assertion can be made, using again the traditional cut-off point,[7a] that the difference is significant and could not have occurred by chance" (Tr. 34). See 398 F.2d at 142; A. 50. The result of this analysis, then, is the determination whether there is a relationship or "association" between Negro defendants convicted of rape of white victims and the death sentence imposed by Arkansas juries; and if so, whether that relationship or association is "significant" in the statistical sense that the possibility of its occurrence by chance is so slight as properly to be discounted. (See Petitioner's Exhibit P-4, pp. 2-4.) (As we shall see *infra*, such a relationship, showing disproportionately frequent death sentencing of Negroes convicted of rape of white victims, was in fact established by the data.)

[7a] Dr. Wolfgang explained in considerable detail the procedures by which relations among items of observed data are tested statistically for reliability, "not only in sociology and social sciences, but other disciplines as well, . . . such as medical research" (Tr. 36). The basic procedure used in the present study—the chi-square method of statistical analysis and the traditional measure of statistical "significance" which treats as real observed relationships that could not have occurred more than five times out of one hundred by chance (expressed in the formula $P < .05$)—is described at Tr. 33-37, with explication of these matters by reference to the familiar example of head-or-tail coin tossing.

Appendix A

3. Data Concerning "Control" Variables.

Data gathering did not stop, however, with the facts of race and sentence. As explained by Dr. Wolfgang, data were collected on numerous other circumstances attending each case of conviction for rape that "were felt to be relevant to the imposition of the type of sentence" (Tr. 40). These data were sought by the exhaustive inquiries that occupy 28 pages of small type on the data-gathering form that is Petitioner's Exhibit P-2—inquiries concerning the defendant (age; family status; occupation; prior criminal record; etc.), the victim (age; family status; occupation; husband's occupation if married; reputation for chastity; etc.), defendant-victim relationship (prior acquaintance if any; prior sexual relations if any; manner in which defendant and victim arrived at the scene of the offense), circumstances of the offense (number of offenders and victims; place of the offense; degree of violence or threat employed; degree of injury inflicted on victim if any; housebreaking or other contemporaneous offenses committed by defendant; presence *vel non* at the time of the offense of members of the victim's family or others, and threats or violence employed, or injury inflicted if any, upon them; nature of intercourse; involvement of alcohol or drugs; etc.), circumstances of the trial (plea; presentation *vel non* of defenses of consent or insanity; joinder of defendant's rape trial with trial on other charges or trial of other defendants; defendant's representation by counsel (retained or appointed) at various stages of trial and sentencing; etc.), and circumstances of post-trial proceedings if any. See 398 F.2d at 142; A. 50-51.

The district court aptly characterized these factors as "Generally speaking, and subject to certain exceptions, . . . variables . . . which reasonably might be supposed to either

aggravate or mitigate a given rape" (257 F. Supp. at 718 n. 8; A. 35, n. 8). Their exhaustive scope appears upon the face of Petitioner's Exhibit P-2, and from Dr. Wolfgang's testimony: "The principle underlying the construction of the schedule [Petitioner's Exhibit P-2] was the inclusion of all data that could be objectively collected and transcribed from original source documents that were available to the investigators—the field investigators—such as appeal transcripts, prison records, pardon board records, and so forth, and whatever was generally available was included. In this sense, it was a large eclectic approach that was used for the purpose of assuring ourselves that we had all available data on these cases" (Tr. 96-97; see also Tr. 65-70). Dr. Wolfgang conceded that some data potentially pertinent to sentencing choice were not collected—for example, strength of the prosecution's case in each individual rape trial—but explained that this was because such items were not information "that we could objectively collect" (Tr. 97). See 398 F.2d at 142; A. 51.

The pertinency of these data to the study was that some of the many circumstances investigated, "rather than race alone, may play a more important role in the disproportionate sentencing to death of Negro defendants convicted of raping white victims" (Tr. 40).

> "These factors, not race, it could be argued, may be determining the sentencing disposition; and Negroes may be receiving death sentences with disproportionate frequency only because these factors are disproportionately frequent in the case of Negro defendants. For example, Negro rape defendants as a group, it may be contended, may employ greater violence or do greater physical harm to their victims than do white rape defendants; they may more frequently be repre-

sented at their trials by appointed rather than retained counsel, and they may more frequently commit contemporaneous offenses, or have a previous criminal record, etc." (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, p. 5.)

In order to determine whether the control variables explained or accounted for the racial disproportion in death sentencing, analysis had to be made of the relationship between each such factor for which data were available and sentence on the one hand, race on the other. Dr. Wolfgang explained that no variable could account for the significant association between Negro defendants with white victims and the death sentence unless that variable "was significantly associated with the sentence of death or life" (Tr. 41), and unless it *also* was significantly associated with Negro defendants convicted for rape of white victims (Tr. 41-42).

A variable, even though associated with such Negro defendants (i.e., found disproportionately frequently in their cases), could not furnish a non-racial explanation for their over-frequent sentence to death unless it was itself affecting the incidence of the death sentence (as evidenced by its significant association with the death sentence) (see, e.g., Tr. 45-46); while a variable which was *not* associated with Negro defendants convicted of rape of white victims could also not explain the frequency with which they, as a class, were sentenced to death (e.g., Tr. 49-52). See generally Petitioner's Exhibit P-4, pp. 6-7.

4. Results and Conclusions.

Based on his study of the data gathered for the twenty years 1945-1965 in the State of Arkansas, Dr. Wolfgang con-

cluded categorically that "*compared to all other rape defendants, Negroes convicted of raping white victims were disproportionately sentenced to death.*" (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, p. 8, para. 3 (original emphasis).) "We found a significant association between Negro defendants having raped white victims and the disproportionate imposition of the death penalty in comparison with other rape convictions." (Tr. 52; see also Tr. 37-39.) Indeed, the disparity of sentencing between Negroes with white victims and all other racial combinations of convicted defendants and victims was such that it could have occurred less than twice in one hundred times by chance (Tr. 37-38)—i.e., if race were not really related to capital sentencing in Arkansas, the results observed in this twenty-year study could have occurred fortuitously in two (or less) twenty-year periods since the birth of Christ. Thus, the Wolfgang study convincingly documents the discrimination which previously available data—collected less systematically or in a form permitting less rigorous scientific analysis—also suggests: for example, the Federal Bureau of Prisons' National Prisoner Statistics for executions during the period 1930-1962 (Petitioner's Exhibit P-6, Tr. 99-101), which disclosé that more than nine times as many Negroes as whites were put to death for rape during this period in the United States. See also pp. 13-16, *supra*, of this brief.

A considérable part of Dr. Wolfgang's testimony was addressed to the question whether this disproportion could be explained away or accounted for by the operation of other, non-racial ("control") variables. He testified that after the Arkansas data were collected, he considered and subjected to analysis every such variable or factor about which sufficient information was available to support scientific study (Tr. 56, 64-65, 78-80, 97). With respect to a substantial

number of the variables investigated by the field researchers, their exhaustive exploration[5a] failed to provide enough

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[5a] By reason of the court's pre-trial order and respondent's concession under the procedures fixed by that order that the responses recorded by the field researchers on the individual case schedules were accurate (see pp. 1a-3a, *supra*), petitioner did not present in any systematic fashion below testimony relating to the data-gathering procedures. The concession, of course, included the accuracy of the response "unknown" wherever that appeared on a schedule, and—as counsel for petitioner pointed out in the district court, without disagreement from respondent or the court—the response "unknown" "means that research, using the State's records and using all of the resources that we have poured into this case, is unable to make any better case than this" (Tr. 153-156).

The nature of the research effort involved is indicated by Petitioner's Exhibit P-3 (Tr. 25-27, 57), the instructions to the field researchers. These instructions include the following, at pp. 4-6:

> "Whether the work is done by a single researcher or divided among more than one, the course of investigation of any specific case will ordinarily involve the following steps:
>
> "(1) Inspection of the county court docket books for entries relating to the case.
>
> "(2) Inspection of all other records relating to the case available at the county court: file jackets, transcripts, witness blotters, letter files, pre-sentence reports.
>
> "(3) Inspection of appellate court records in any case where appeal was taken. Appellate court records include the docket of the appellate court, its file jacket, record on appeal (if maintained on file in the appellate court), court opinion or opinions if any, and appellate court clerk's letter file.
>
> "(4) Inspection of prison records of the defendant if he was incarcerated in a prison which maintains records.
>
> "(5) Inspection of pardon board records in any case where the defendant submitted any application for executive clemency.
>
> "(6) If the foregoing sources fail to provide sufficient information to complete the schedule on the case, interview of defense counsel in the case.
>
> "(7) If the foregoing sources fail to provide sufficient information to complete the schedule on the case, inspection of local and area newspaper files for items pertaining to the case.
>
> "Three general directives should be kept in mind.
>
> "(A) We are concerned with the sentencing decision, in each case, of a particular official body at a particular time

information for study. (E.g., victim's reputation for chastity, Tr. 79.) Notwithstanding respondent's pre-trial

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(i.e., the trial judge or jury; the pardon board). Every such body acts—can act—only on the facts known to it at the time it acts. For this reason, the "facts" of a case called for by the schedule mean, so far as possible, the facts perceived by the sentencing body. Facts which we know to have been known to the sentencing body are preferred facts, and sources which disclose them are preferred sources. (A trial transcript, where it exists, is therefore the most desirable source of facts.) Other sources are of decreasing value as the likelihood decreases that the facts which they disclose were known to the sentencing body. (A newspaper story which purports to report trial testimony, therefore, is to be preferred to one which purports to report the facts of the offense on the basis of other sources of information.)

"(B) After this survey is completed, its results will be made the basis for allegations of fact in legal proceedings. If the allegations are controverted, it will be necessary to prove them, and the proof will have to be made within the confines of ordinary evidentiary rules, including the hearsay principle, best evidence rule, etc. For this reason, sources of facts which are judicially admissible evidence to prove the facts which they disclose are preferred sources. Official records are most desirable in this dimension; then the testimony of witnesses having knowledge of the facts (for example, defense counsel), finally, secondary written sources (for example, newspapers). Wherever an official record or document may contain pertinent information, inspect it yourself if you can; don't take somebody's word for what is in it.

"(C) Many of the facts you need to know will have been contested in the judicial and post-judicial proceedings leading to a defendant's sentence and its execution. We have no method for resolving factual disputes or, ordinarily, for knowing how the triers of fact resolved them. As an invariable rule, then, the facts should be reported in the light most favorable to the prosecution, and most unfavorable to the defendant, in every case. If a trial transcript exists, and if it contains the testimony of the complaining witness and of the defendant, resolve all conflicts of testimony in favor of the complaining witness and report the facts as they might reasonably have been found by a jury which credited the complaining witness, drew all rational inferences from her

concession of the accuracy of the field researchers' responses on the individual case schedules, including the response "unknown" where that appeared (see note 8a *supra*), counsel for respondent attempted to suggest in cross-examination of Dr. Wolfgang that these gaps in information impugned the underlying data-gathering process. Dr. Wolfgang replied:

> "the absence of information, I would be unwilling to assert is due to lack of any effort. Very diligent efforts were made by the field investigators to collect the information—from court clerks, from police records, from prisons, from other sources available in the community—and they were instructed to follow down each piece of information, each source of information to its fullest extent, so that I have no reason to doubt that the effort was made to collect the data" (Tr. 80).

His testimony as a whole makes it clear that—although, as he put it: "Information is always limited" (Tr. 72)—he was confident that he had enough of it to support his conclusions. (See particularly Tr. 76-79.)

He was able to subject twenty-two "quite relevant variables" (Tr. 78)—in addition to race of defendant, race of victim, and sentence—to analysis. (See Petitioner's Exhibit P-4, Appendix A; Tr. 29, 52.) Most of these were not significantly associated with sentence, and so Dr. Wolf-

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testimony most strongly against the defendant, discredited the defendant, and refused to draw any disputable inferences in his favor. Treat all other sources in a similar fashion. In interviews with defense counsel, try to impress upon counsel that you have to have the facts as they might have appeared in the worst light for his client. In reading newspaper items which give conflicting versions of the facts, adopt the version most unfavorable to the defendant."

gang could assert categorically that they did not account for or explain the disproportionately frequent death sentencing of Negroes with white victims (Tr. 42-46, 53-54). These variables included the defendant's age, whether he was married, whether he had dependent children, whether he had a prior criminal record; the victim's age, whether she had dependent children; whether the defendant and victim were strangers or acquaintances prior to the offense; place where the offense occurred (indoors or outdoors), whether the defendant committed an unauthorized entry in making his way to that place; whether the defendant displayed a weapon in connection with the offense; degree of seriousness of injury to the victim; and the defendant's plea (guilty or not guilty), type of counsel (retained or appointed), and duration of trial (Tr. 47, 53; Petitioner's Exhibit P-4, p. 9, para. 5; Petitioner's Exhibit P-5). Two variables were shown to bear significant association with sentence: death sentences were more frequent in the cases of defendants who had a prior record of imprisonment, and in the cases of defendants who committed other offenses contemporaneously with the rape. But because these variables were not associated with race,[9a] Dr. Wolfgang concluded that they also could not account for the fact that Negroes convicted of rape of white victims were disproportionately often sentenced to death (Tr. 47-52, 54; Petitioner's Exhibit P-4, pp. 8-9, para. 4; Petitioner's Exhibit P-5). Other variables appeared so frequently or so in-

[9a] Statistical analysis of the association between these variables and race of the defendant disclosed no significant association. When defendant-victim racial combinations were considered, the numbers of cases for which information was available became too small for statistical treatment, but on the basis of trend of association, Dr. Wolfgang concluded that here too there was no association of significance.

frequently in the total population of cases studied that statistical analysis of them was "unnecessary and impossible": the fact that they appeared to characterize all cases (or no cases), irrespective of sentence or of racial combinations of defendant and victim, pointed to the conclusion that they were not available explanations for the relationship observed between death sentences and Negroes with white victims. These variables included the victim's reputation for chastity and prior criminal record; whether the defendant and victim had had sexual relations prior to the occasion of the rape; the degree of force employed by the defendant; whether the victim was made pregnant by the rape; and whether the defendant interposed a defense of insanity at trial (Tr. 54-55, 94-95, Petitioner's Exhibit P-5). Summarizing, Dr. Wolfgang found that no variable of which analysis was possible could account for the observed disproportionate frequency of sentencing to death of Negroes convicted of rape of white victims (Tr. 56-57). His ultimate conclusion was:

> "On the basis of the foregoing findings, it appears that Negro defendants who rape white victims have been disproportionately sentenced to death, *by reason of their race*, during the years 1945-1965 in the State of Arkansas." (Dr. Wolfgang's written report, Petitioner's Exhibit P-4, pp. 13-14 (emphasis added).)

B. *The Opinion of the District Court.*

Although respondent presented no evidence of any sort in rebuttal, the district court disagreed with Dr. Wolfgang's conclusions. It accepted his finding that the differential sentencing to death of Negroes with white victims "could not be due to the operation of the laws of chance"

(257 F. Supp. at 718; A. 35); but supposed, again without any sort of evidentiary presentation by the State, that it might be due to some factor respecting which statistical analysis had not been possible, such as the issue of consent in rape cases (257 F. Supp. at 720-721; A. 40). The Court remarked that the "variables which Dr. Wolfgang considered are objective . . . broad and in instances . . . imprecise"; that in many of the individual rape cases studied "the field workers were unable to obtain from available sources information which might have been quite pertinent"; and that "Dr. Wolfgang's statistics really reveal very little about the details" of comparative individual cases of rape. (257 F. Supp. at 720; A. 39.) While recognizing that "the sample drawn by Mr. Monroe seems to have been drawn in a manner which is acceptable statistically" (257 F. Supp. at 720; A. 38), the court noted that the counties randomly chosen had turned out not to be evenly geographically dispersed, and not to include many counties of sparse Negro population (*ibid.*). Garland County, which was not itself included in the sample, is a county of sparse Negro population located in a portion of the State in which the sample counties fell less frequently than elsewhere. For those reasons, the district court declined to conclude that "the Garland County jury which tried petitioner was motivated by racial discrimination when it failed to assess a punishment of life imprisonment" (257 F. Supp. at 719; A. 37)—(a subjective proposition, parenthetically, which petitioner's counsel had explicitly disavowed any intention to undertake to prove). With regard to the State of Arkansas generally, the district court thought that the "cases studied, and the number of death sentences imposed are simply too few in number to afford convincing proof" of racial discrimination (257 F. Supp. at 720; A. 38).

Placing some reliance on the language in Dr. Wolfgang's written report to the effect that the report was "preliminary" and "tentative" (257 F. Supp. at 720; A. 39), the court concluded:

> "On the meager material before it the Court is simply not prepared to convict Arkansas juries of unconstitutional racial discrimination in rape cases. As a matter of fact, the Court doubts that such discrimination, which is a highly subjective matter, can be detected accurately by a statistical analysis such as was undertaken here. Statistics are elusive things at best, and it is a truism that almost anything can be proved by them." (257 F. Supp. at 720; A. 39-40; see also 257 F. Supp. at 719-720; A. 37-38.)

C. *The Opinion of the Court of Appeals.*

The court of appeals agreed with the district court in rejecting petitioner's contention that his death sentence must be set aside by reason of racial discrimination in capital sentencing—but for somewhat different reasons. "Like the trial court, . . . although perhaps not for each and all of the reasons it advanced, we feel that the [statistical] argument does not have validity and pertinent application to Maxwell's case." (398 F.2d at 146; A. 59.) "What we are concerned with here is Maxwell's case and only Maxwell's case." (398 F.2d at 147; A. 60.)

The court of appeals, in general, appears to concede the validity of Dr. Wolfgang's methodology, and even of his conclusion that a pattern of racial discrimination has been shown. (398 F.2d at 146-148; A. 59-64.) It finds that Dr. Wolfgang testified his report was "preliminary" only "in the sense that the other states for which data was being col-

lected would be included in the final report." (398 F.2d at 143; A. 52-53.) And the court accepts that there are "recognizable indicators" "that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it."[10a] Nevertheless the court holds, in effect, that this statistical showing of discrimination is irrelevant because it does "not show that the petit jury which tried and convicted Maxwell acted in his case with racial discrimination" (398 F.2d at 147; A. 60) or that *Maxwell himself* "was the victim of discrimination based on race" (398 F.2d at 148; A. 64.)

> "[W]hatever . . . suspicion it may arose [sic] with respect to southern interracial rape trials as a group over a long period of time, and whatever it may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial." (398 F.2d at 147; A. 61-62.)

This is so because the Arkansas statistics "do not relate specifically to Garland County where this particular offense was committed and where Maxwell was tried and convicted." (398 F.2d at 146; A. 59.)

> "[W]hile it is true that it is in a sense the state which prosecutes, nevertheless the county has a char-

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[10a] (398 F.2d at 148; A. 63.) Despite the generality of the court's language, this finding must relate specifically to the State of Arkansas. This is so because no proof was offered on this record of the results of the Wolfgang study in other States. The only evidence of record with regard to areas outside Arkansas was Petitioner's Exhibit P-6, the National Prisoner Statistics. These show raw numbers of executions for rape and murder, by race, for all the States. (See pp. 13-15 n. 11, *supra.*) They do no more than show that Dr. Wolfgang's conclusions for Arkansas are conformable to the national pattern. Thus, if there is south-wide discrimination, there is most assuredly discrimination in Arkansas.

acter, too. . . . Yet the Garland County statistics [produced in the earlier habeas corpus proceeding] . . . afford no local support to the petitioner's statistical argument. The evidence produced at the prior hearing and at this one discloses only Maxwell as a recipient of the death penalty in Garland County for rape.

". . . [W]e are not yet ready to nullify this petitioner's Garland County trial on the basis of results generally, but elsewhere, throughout the South." (398 F.2d at 147; A. 61.)

We think it apparent, on a fair reading of the court of appeals' opinion, that that court found unavoidable Dr. Wolfgang's conclusion concerning racial discrimination in capital sentencing by Arkansas juries in rape cases. At the very least, the court of appeals explicitly admitted that there are "recognizable indicators" and "ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it." (398 F.2d at 148; A. 63.)

APPENDIX B

Available Information Relating to the Proportion of Persons Actually Sentenced to Death, Among Those Convicted of Capital Crimes.

It is exceptionally difficult to obtain information which will permit construction of a reliable estimate concerning the proportion of persons actually sentenced to death,* among all those convicted of capital crimes. In order to calculate this proportion, two comparable figures are required: the number of persons convicted of a given capital offense, and the number of persons sentenced to death for it. The figures must be *comparable* in the sense that they relate to the same jurisdiction, the same period of time, and the same offense.

Figures for the number of death sentences imposed *during recent years, for each of the several capital offenses*, in each of the capital punishment jurisdictions, may be ascertained albeit somewhat laboriously from data reported in the National Prisoner Statistics Bulletins on *Executions*. The relevant tables may often in the footnotes,** which also

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* By persons actually sentenced to death we mean persons upon whom the sentencing authority, judge or jury, imposes a death sentence. We do not mean to take account of later judicial decisions or executive clemency or of any other factor that may result in the initial death sentence not being carried out.

** The National Prisoner Statistics Bulletins on *Executions* are published annually. The title is [illegible] Department of Justice, Bureau of Prisons, National Prisoner Statistics, No. 37, Executions [1930-1961]. June 1962. In the columns below we list the numbers and titles of the tables relied upon in this Appendix, the abbreviations which will hereafter be used to designate each, and the pages and tables of each that contain pertinent information.

Number, title, date	Abbreviation	Page and table
No. 37, Executions [illegible] April 1962	NPS 1961	[illegible] unnumbered table 5

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sets forth the citation form that will be used hereafter to describe each bulletin. There are several problems with the tables as sources of information relating to the number of persons sentenced to death. First, the figure which they report represents the number of persons received by the respective state penitentiaries from the courts, each year, under sentence of death. This may be fewer than the actual number of death sentences imposed in some states, where the practice is to hold a death-sentenced man in a local facility pending post-verdict motions and or appeals. Second, for this or other reasons, a few death sentences imposed each year are not reported to the NPS until the following year. The latest NPS Bulletin gives revised figures for prisoners received from court under sentence of death for each year since 1961 (NPS (1967), p. 12, table 4); but these figures are not broken down by jurisdiction and offense. Figures broken down by jurisdiction and offense must be taken from the earlier annual reports, and have not been revised.

But these problems are inconsequential compared to those of ascertaining comparable figures relating to the

Number, title, date	*Abbreviation*	*Page and table*
No. 32, Executions 1962 (April, 1963)	NPS (1962)	p. unnumbered, table 5
No. 34, Executions 1930-1963 (May, 1964)	NPS (1963)	p. 14, table 5
No. 37, Executions 1930-1964 (April, 1965)	NPS (1964)	p. 14, table 4
No. 39, Executions 1930-1965 (June, 1966)	NPS (1965)	p. 14, table 4
No. 41, Executions 1930-1966 (April, 1967)	NPS (1966)	p. 13, table 4
No. 42, Executions 1930-1967 (June, 1968)	NPS (1967)	pp. 12-17, tables 4-7

number of convictions for capital offenses. Conviction figures are almost nowhere published. The rare published figures suffer from assorted woes that virtually destroy their usefulness. Some states report judicial statistics for fiscal years, making comparison with the calendar-year NPS reports difficult. Most states report conviction figures for categories of cases ("murder"; "sexual offenses") that include, but are not entirely composed of, capital crimes. Many states report not conviction figures, but figures concerning the number of commitments to the state penitentiary under conviction and sentence for given offenses. These figures omit large numbers of convicted persons: namely, those sentenced to imprisonment in local facilities, or to probation, or whose sentences are suspended. Secondary sources reporting conviction figures suffer from the same defects and often, in addition, they report totals for a span of years that includes both a period of mandatory capital sentencing and a succeeding period of discretionary capital sentencing within a jurisdiction.

Confronted with these problems, we adopt the approach of setting out below all of the information we can find relating to the question of what proportion among all convicted capital offenders are actually sentenced to death. The information comes from a variety of states, for a variety of periods, and has a variety of problems. We report each item separately, and explain its problems as we see them.

A. *Rape.*

1. Partington appears to say that, between 1908 and 1963, there were 2,298 offenders committed to the Virginia State Penitentiary upon convictions for the capital crimes

of rape, attempted rape, statutory rape, and attempted statutory rape. There were 68 death sentences in this group, including two imposed upon defendants who had been convicted of capital robbery as well as the sexual offense. For rape alone, there were 1365 commitments, including 41 death sentences. The principal problem with these figures appears to be that the commitment figures are doubtless considerably lower than the number of capital convictions, since some capital offenders would have received jail terms, probation, or suspended sentences. Partington, *The Incidence of the Death Penalty for Rape in Virginia*, 22 Wash. & Lee L. Rev. 43, 43-44, 71-73 (1965).

2. Johnson reports that in North Carolina, between July 1, 1938 and December 31, 1953, there were 382 convictions for rape, as compared with 32 death sentences (admissions to death row) upon conviction for rape. The conviction figure seems unduly low, even considering the availability to the jury of verdicts for lesser offenses. Johnson, *Selective Factors in Capital Punishment*, 36 Social Forces 165, 166 (1957).

3. In the federal courts, where rape is capitally punishable under both the federal code and the District of Columbia Code, there appear to have been a total of 111 rape convictions between July 1, 1961 and June 30, 1966, excluding the fiscal year 1964-1965, for which no figure is reported. For the calendar years 1961 through 1966, no death sentences were imposed for rape by a federal court. Conviction figures are taken from table D3 in the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1962-1966; death sentence figures from NPS (1964) through NPS (1966).

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4. Dr. Wolfgang's study of rape convictions in the State of Arkansas described in Appendix A to this brief uncovered 55 instances of conviction for rape in 19 counties over the period 1945-1965. (This figure excludes a few cases which were not subjected to analysis for want of essential information relating to them.) In 14 of the cases, the death sentence was imposed. See Petitioner's Exhibit P-4, Appendix B, table 1.

5. There appear to have been 96 commitments under conviction for capital rape offenses in Florida between July 1, 1964 and June 30, 1966. During the three calendar years encompassing these two fiscal years, 8 men were sentenced to die for rape. Florida Division of Corrections, Fifth Biennial Report (July 1, 1964-June 30, 1966) (1966) 74-75; NPS (1964); *id.* (1965); *id.* (1966).

6. There appear to have been 89 commitments under conviction for rape and assault with intent to rape in Maryland between July 1, 1965 and June 30, 1966. During the two calendar years encompassing that one fiscal year, 2 men were sentenced to die for rape offenses. (During these years all rape and assault with intent to rape were capital in Maryland.) State of Maryland, Department of Correction, Fortieth Report (July 1, 1965 - June 30, 1966) (1966) 36; NPS (1965); *id.* (1966).

7. There appear to have been 186 commitments under conviction for rape in Georgia between July 1, 1964 and June 30, 1967. During the four calendar years encompassing these three fiscal years, 8 men were sentenced to die for rape. State of Georgia Board of Corrections, Annual Report (July 1, 1964 - June 30, 1965) (1965) 56; *id.* (July 1, 1965 - June 30, 1966) (1966) 52; *id.* (July 1, 1966 - June 30, 1967) (1967) 39; NPS (1964); *id.* (1965); *id.* (1966); *id.* (1967).

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8. There appear to have been 21 commitments under conviction for rape in Tennessee between July 1, 1965 and June 30, 1966. During the two calendar years encompassing this fiscal year, 5 men were sentenced to die for rape in the state. TENNESSEE DEPARTMENT OF CORRECTION, DEPARTMENTAL REPORT (Year ending June 30, 1966) (pages unnumbered; chart designated: "Offenses Committed"); NPS (1965); *id.* (1966).

9. Because of the extreme paucity of available data relating to the question dealt with in this Appendix, we venture to set forth the figures discovered in Dr. Wolfgang's study of several other states, although as yet unpublished.[*] Data from six states, in addition to Arkansas, have thus far been analyzed. We give the respective numbers of rape convictions and death sentences for rape during the period 1945-1965 in a representative sample of counties for each state (again excluding cases eliminated from analysis because of lack of essential information).

State	*Rape Convictions*	*Death Sentences*
Alabama	185	20
Florida	218	36
Georgia	369	47
Louisiana	125	22
South Carolina	394	26
Tennessee	213	18

[*] We feel that there is no impropriety in presenting these figures for the information of the Court, since they serve to cast light on an obscure and essentially non-controversial point. We have of course abstained from making reference to Dr. Wolfgang's findings relating to the impact of racial factors on capital sentencing in other states than Arkansas, since that issue is a more controversial one.

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B. *Murder.*

1. Wolfgang reports that in Philadelphia during the period 1948-1952 there were 77 convictions of first degree murder, as compared with 7 death sentences. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE (Science ed., Wiley, 1966) 305-306, table 36.

2. Kalven and Zeisel report 21 death sentences out of a sample of 111 murder cases tried in the years 1954, 1955 and 1958 in which a jury returned a verdict of guilty of a capital degree of the offense, and the presiding judge agreed with their guilty verdict. KALVEN & ZEISEL, THE AMERICAN JURY (1966) 435-436.

3. Johnson reports that in North Carolina, between July 1, 1938 and December 31, 1953, there were 742 convictions for first degree murder, as compared with 162 death sentences (admissions to death row) upon conviction for first degree murder. Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES 165, 166 (1957).

4. Bedau reports that in New Jersey, between 1916 and 1955, 497 persons were committed to the state penitentiary with life sentences for murder, while 157 persons were sentenced to death for murder. (These are all first degree cases, it would appear, since New Jersey law does not permit life imprisonment for second degree murder. The death penalty for first degree murder was made discretionary in 1916.) The problem here is that the figures for conviction include both jury convictions (entailing jury discretion to sentence to life or death) and court convictions upon a plea of *non vult* (which, under New Jersey law, precludes the death penalty). Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1, 30 (1964).

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Between 1956 and 1960 in New Jersey, Bedau finds 61 first degree murder convictions, resulting in 13 death sentences and 48 life sentences (17 on a jury verdict and 31 on a plea of *non vult*). *Id.* at 51.[a] These figures may relate only to male convicts, since Bedau received his conviction figures from Edwin Wolf (see next paragraph), who studied the prison records of convicted male offenders.

5. Wolf reports that of 159 convictions by a jury of a male offender for the offense of first degree murder in New Jersey between 1937 and 1961, 62 resulted in a death sentence and 97 in a sentence of life imprisonment. Wolf, *Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey: 1937-1961*, 19 RUTGERS L. REV. 56, 60 (1964).

6. In the federal courts, where first degree murder is capitally punishable under both the federal code and the District of Columbia Code, there appear to have been a total of 11 convictions for this offense between July 1, 1961 and June 30, 1966, excluding the fiscal year 1964-1965, for which no figure is reported. During the calendar years 1961 through 1966, 2 death sentences were imposed by federal courts for murder. Note that the death-sentence figure relates to a period of six years, including the four for which the conviction figure is given. This awkward form of comparison is necessitated by the problem of relating calendar to fiscal years. Conviction figures are taken from table D6 in the Annual Reports of the Director of the Administrative Office of the United States Courts for the years 1962-1966; death-sentence figures from NPS (1961) through NPS (1966).

[a] The figure "60" in the lower right-hand cell of table XXVIII ought to be "61." This is so because the figure "4" in the last column for the year 1958 is a typographical error and should read "5."

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7. California reports 88 first degree murder convictions during 1967, as compared with 17 death sentences. STATE OF CALIFORNIA, DEPARTMENT OF JUSTICE, DIVISION OF LAW ENFORCEMENT, BUREAU OF CRIMINAL STATISTICS, REPORT (CRIME AND DELINQUENCY IN CALIFORNIA, 1967) (1968) 140; NPS (1968).

8. There appear to have been 78 commitments under conviction for first degree murder in Florida between July 1, 1964 and June 30, 1966. During the three calendar years encompassing these two fiscal years, 16 men were sentenced to die for first degree murder. FLORIDA DIVISION OF CORRECTIONS, FIFTH BIENNIAL REPORT (July 1, 1964-June 30, 1966) (1966) 74-75; NPS (1964); *id.* (1965); *id.* (1966).

9. There appear to have been 28 commitments under conviction for first degree murder in Maryland between July 1, 1965 and June 30, 1966. During the two calendar years encompassing that one fiscal year, 4 men were sentenced to die for first-degree murder. MARYLAND DEPARTMENT OF CORRECTION, FORTIETH REPORT (July 1, 1965—June 30, 1966) (1966) 36; NPS (1965); *id.* (1966).

10. There appear to have been 269 commitments under conviction for murder in Georgia between July 1, 1964 and June 30, 1967. During the four calendar years encompassing these three fiscal years, 12 men were sentenced to die for murder. (During these years all murder was capital in Georgia, which recognized no degrees of the offense.) STATE OF GEORGIA BOARD OF CORRECTIONS, ANNUAL REPORT (July 1, 1964—June 30, 1965) (1965) 56; *id.* (July 1, 1965—June 30, 1966) (1966) 52; *id.* (July 1, 1966—June 30, 1967) (1967) 39; NPS (1964); *id.* (1965); *id.* (1966); *id.* (1967).

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11. There appear to have been 23 commitments under conviction for first degree murder in Tennessee between July 1, 1965 and June 30, 1966. During the two calendar-years encompassing this fiscal year, no men were sentenced to die for murder in the state. TENNESSEE DEPARTMENT OF CORRECTION, DEPARTMENTAL REPORT (Year ending June 30, 1966) (pages unnumbered; chart designated: "Offenses Committed"); NPS (1965); *id.* (1966).

* * *

In addition to the figures available for comparison, *supra*, national totals of commitments under sentence of death are reported. These alone give some sense of the extreme infrequency with which persons convicted of capital crimes are actually sentenced to death. Thirty-nine States, the District of Columbia, and the federal jurisdiction all have on their books statutes of general applicability punishing one or more offenses with death. In some States, half a dozen or more crimes may be so punishable.[a] Yet the following numbers of men were received under sentence of death in all of the prisons of the United States in the following years (NPS (1968), p. 12, table 4):

1961	140
1962	103
1963	93
1964	106
1965	86
1966	118
1967	85

[a] See Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, as *Amici Curiae*, in *Boykin v. Alabama*, O.T. 1968, No. 642, Appendix A, pp. 1a-8a.

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NPS (1968), p. 13, table 5, breaks down the figure of 85 for the year 1967 as follows, by offense and race:

	White	Nonwhite	Total
Murder	36	38	74
Rape	1	6	7
Kidnaping	1	0	1
Robbery	0	1	1
Assault by Life Prisoner[6b]	2	0	2
Burglary	0	0	0
	40	45	85

[6b] This is a California offense, carrying a mandatory death sentence.

APPENDIX C

Manner of Submission of the Death-Penalty Issue at Petitioner Maxwell's Trial.

The only instruction to the jury at Maxwell's trial relating to its sentencing function was the following passage, which concluded a lengthy instruction dealing with the substantive law of rape and the principle that, to convict the defendant of rape, the jury must find him guilty beyond a reasonable doubt:

> "If you find the defendant guilty, you will say: 'We the Jury, find the defendant guilty of rape as charged in the information.' If you bring in that verdict then the law fixes the punishment at death and it will be the duty of the Court to sentence him accordingly. But you may bring in this kind of verdict: 'We the Jury, find the defendant guilty of rape as charged in the information and fix his punishment at life imprisonment in the Penitentiary.' But if you find the defendant not guilty, or have a reasonable doubt of his guilt in the whole case, you will say: 'We the Jury, find the defendant not guilty.'" (Trial transcript, p. 332.)

The jury was given three verdict forms in the language just recited, which were read again to the jury before the case was submitted. (*Id.*, at p. 369.)